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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1259

MARATHON OIL COMPANY,
Petitioner

v.

FEDERAL ENERGY ADMINISTRATION;
FRANK G. ZARB, Administrator,
Federal Energy Administration; and
ASHLAND OIL, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75——

MARATHON OIL COMPANY,
Petitioner

v.

FEDERAL ENERGY ADMINISTRATION;
FRANK G. ZARB, Administrator,
Federal Energy Administration; and
ASHLAND OIL, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Marathon Oil Company ("Marathon") petitions that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered in this case on February 17, 1976.

OPINIONS BELOW

The *per curiam* order of the Temporary Emergency Court of Appeals of the United States, entered on February 17, 1976 (A. 1a),[1] and the order of the United

[1] "(A.)" refers to the separately bound Appendix.

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States District Court for the Northern District of Ohio granting final judgment, entered on August 29, 1975 (A. 3a), are not officially reported.[2]

The Temporary Emergency Court of Appeals' *per curiam* order of February 17, 1976, states that two of its other decisions, *Pasco, Inc.* v. *FEA*, No. 10-7 (TECA, Oct. 14, 1975), and *Cities Service Co.* v. *FEA*, No. D.C.-34 (TECA, Dec. 31, 1975), *petition for cert. filed* (No. 75-1230, Feb. 27, 1976), are "dispositive as against all of the contentions" of Marathon. These decisions (not yet reported) are reproduced in the Appendix (A. 83a).

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on February 17, 1976. The District Court had jurisdiction under section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("Allocation Act"), 15 U.S.C. § 754(a)(1), which makes sections 205-207 and 209-211 of the Economic Stabilization Act of 1970 ("Economic Stabilization Act"), note to 12 U.S.C. § 1904, applicable to a regulation promulgated under section 4(a) of the Allocation Act; sections 210(a) and 211(a) of the Economic Stabilization Act; 28 U.S.C. §§ 1331, 2201; and 5 U.S.C. § 702.

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[2] By order entered on January 31, 1975, the District Court denied a motion by Marathon for a preliminary injunction and a motion for certification of substantial constitutional questions (A. 27a). This order is not reported. The Temporary Emergency Court of Appeals dismissed Marathon's appeal of the January 31, 1975, District Court order for lack of jurisdiction by order entered on April 21, 1975 (A. 6a). This order is reported at 516 F.2d 1397.

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The Temporary Emergency Court of Appeals had jurisdiction to review the judgment of the District Court and to consider the constitutional issues raised in this case under section 5(a)(1) of the Allocation Act, which makes sections 205-207 and 209-211 of the Economic Stabilization Act applicable to a regulation promulgated under section 4(a) of the Allocation Act; and sections 211(b)(2), (c) of the Economic Stabilization Act.

This Court has jurisdiction to review the judgment of the Temporary Emergency Court of Appeals under section 5(a)(1) of the Allocation Act, which makes sections 205-207 and 209-211 of the Economic Stabilization Act applicable to a regulation promulgated under section 4(a); section 211(g) of the Economic Stabilization Act; and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether directives of the President that Marathon make payments to other oil refiners of more than $62 million over a period commencing in January 1975 and continuing as of this date, even if arguably authorized by an act of Congress, violate the fifth amendment because they effect a taking for a private rather than a public use, and because they constitute a taking without just compensation.

2. Whether such directives, even if arguably within the stated objectives of the Emergency Petroleum Allocation Act of 1973, were authorized by that act.

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. V, § 4:

> ". . . nor shall private property be taken for public use, without just compensation."

Section 4(a) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(a):

> ". . . the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation."

Section 4(b)(2)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(b)(2)(A):

> "(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—
>
> "(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level".

The relevant regulations of the Federal Energy Administration are set forth in the Appendix (A. 46a).

STATEMENT

Marathon Oil Company ("Marathon"),[3] under the challenged directives of the Federal Energy Adminis-

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[3] Marathon produces, transports, refines and sells crude oil in the United States and abroad. As a result of substantial past and continuing capital expenditures in exploration and development, Mara-

tration ("FEA"),[4] has paid other oil refiners more than $62 million since January 1975. During 1975 Marathon posted checks ranging in amounts from a low of $546 thousand in May to almost $11.6 million in August. With the enactment of the Energy Policy and Conservation Act[5] in December 1975, FEA has continued to issue such directives. Accordingly, Marathon expects that it will be required to make substantial monthly payments to other refiners for several more years.

On December 4, 1974, FEA promulgated in the form of a regulation what is known as the entitlements program. 39 Fed. Reg. 42246 (1974). The preamble to the notice proposing establishment of the program cited section 4(a) of the Allocation Act as statutory authority for the program. 39 Fed. Reg. 31650 (1974). On January 10, 1975, FEA issued its first directive that Marathon and certain other refiners make payments to other oil refiners by the end of that month. 40 Fed. Reg. 2560 (1975) (A. 57a).

Mechanically, the entitlements program imposes an obligation upon a refiner that it have what FEA defines as an "entitlement" for each barrel of "old oil"

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thon has valuable domestic crude oil resources. Marathon's three domestic refineries are located in Illinois, Michigan and Texas. The company markets gasoline and other petroleum products in the midwestern and the southeastern sections of the United States. It is not a market leader in any state.

[4] The President's authority under the Allocation Act was delegated to the Federal Energy Office ("FEO"). 38 Fed. Reg. 33575 (Dec. 6, 1973). FEA was established by Congress on June 27, 1974, as an independent agency and assumed the authority and responsibility of FEO. Federal Energy Administration Act, 15 U.S.C. §§ 761-766; *see* Executive Order 11790, 39 Fed. Reg. 23185 (June 27, 1974).

[5] 89 Stat. 871.

which it refines in each month.[6] Each month FEA establishes "an adjusted national old oil supply ratio"[7] and "issues" each refiner a number of entitlements equal to the number of barrels of crude oil it refined two months previously, multiplied by the adjusted national old oil supply ratio. If, on the basis of information supplied to FEA by the refiner, FEA determines that the refiner had insufficient entitlements, it directs that refiner to "purchase" entitlements at a certain price per entitlement from oil companies which have a surplus. Since an "entitlement" is simply a creature of the program, the directive is nothing more than a mandate that a refiner pay to another refiner a specified sum of money. This Congress recognized in section 403(a) of the recent Energy Policy and Conservation Act, wherein it is stated that the entitlements program is nothing more than a "cash transfer arrangement." 89 Stat. 948, *amending* 15 U.S.C. § 753.

Refiners which benefit from the program are those whose refinery runs are made up of lower percentages

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[6] Old oil is essentially an amount of domestic crude oil produced from a property equal to or less than the amount produced during a base period. This oil may not be lawfully sold at a price higher than a prescribed ceiling price, which has been approximately $5.25 per barrel. Approximately sixty percent of the oil produced in the United States is identified for price control purposes as old oil.

[7] The numerator of the adjusted national old oil supply ratio is the amount of old oil received by all companies in a particular month. The denominator of this ratio is the total number of barrels of crude oil refined by all refiners for that month, and includes, in addition to old oil, "new oil" (a property's production in excess of the base level) and imported crude oil. 10 C.F.R. § 211.62. Prior to the effective date of regulations issued pursuant to the Energy Policy and Conservation Act, new oil was not subject to price controls. It now sells at a prescribed price of approximately $11.28. *See* 41 Fed. Reg. 4931 (Feb. 3, 1976). The federal government has not established price ceilings for imported oil.

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of old oil than the adjusted national old oil supply ratio. For instance, under the program Respondent Ashland Oil, Inc. has received more than $130 million. Amerada Hess Corporation has received close to $400 million from Marathon and other refiners.

Although the amount a refiner has been directed to pay another refiner may lawfully be passed through to customers,[8] the program, as structured, provides no reasonable assurance that a refiner required to make payments will be able to recover these payments in the marketplace.

On January 23, 1975, Marathon commenced this action in the United States District Court for the Northern District of Ohio[9] to obtain preliminary and permanent injunctive relief from its January 1975 payment obligation and future payment obligations under the entitlements program. It also sought a declaratory judgment that FEA's promulgation of the entitlements program and its issuance of monthly payment directives were unlawful, and a certification to TECA that there was a substantial question whether the directives were consistent with the fifth amendment to the Constitution. The District Court denied Marathon's motions for preliminary relief on January 31, 1975 (A. 27a). The Temporary Emergency Court of Appeals ("TECA") dismissed Marathon's appeal of the Dis-

[8] 10 C.F.R. § 212.83. However, a portion of a refiner's crude oil costs, which include payments made under the entitlements program, must be allocated to the refiner's own plant fuel, and thus not all crude oil costs may be passed through to customers. FEA Ruling 1974-27, printed at 10 C.F.R. at 291 (1975).

[9] On January 13, 1975, Marathon applied to FEA for administrative relief from its payment obligations. On May 15, 1975, FEA issued a final denial of Marathon's applications, stating that Marathon had exhausted its administrative remedies.

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trict Court's order for lack of jurisdiction on April 21, 1975. (A. 6a). On August 27, 1975, Marathon filed a second motion for a preliminary injunction, seeking relief from FEA's August 1975 order that the company pay $11.6 million by the close of that month. On August 29, 1975, the District Court denied this motion and, upon its own motion, entered final judgment against Marathon (A. 3a). On the same date Marathon filed its notice of appeal. On February 17, 1976, TECA affirmed (A. 1a). This petition seeks review and reversal of that judgment.

REASONS FOR GRANTING THE WRIT

1. This petition presents the basic question of whether government directives which require one company to pay a substantial sum of money to another company, which the government has determined to be less able to compete, constitute a taking by the government of private property subject to the limitations of the fifth amendment. The national significance of this issue, as it arises here, is demonstrated by the financial impact which the government's directives under the entitlements program have had, and continue to have, on those companies in the United States engaged in the production and refining of their domestic oil resources. Since January 1975 monthly directives issued by FEA have taken more than $1.5 billion from a limited number of refiners and have conferred these monies directly upon others in the petroleum industry. The program has resulted in extensive federal court litigation involving payors and payees and the imposition of criminal fines upon one refiner which failed to comply.[10]

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[10] Gulf Oil Corporation was criminally indicted in the United States District Court for the Western District of Pennsylvania for

The program imposes the substantial financial burden of subsidizing one group of oil refiners upon a diminishing number of other oil refiners, rather than upon the government.[11] This is in sharp contrast to action recently taken by Congress to reorganize the bankrupt railroads in the northeast and midwest sections of the country. Having determined that the continued operation of portions of these railroads was in the national interest, Congress established a reorganization plan which provided for large infusions of federal money and invitations (not directives) to profitable railroad companies to purchase properties of the bankrupt railroads. Had Congress determined that the financial difficulties of these bankrupt railroads should be redressed through payments to be made by profitable companies, such as the Chessie System, the Regional Rail Reorganization Act of 1973 would have had the same constitutional defects as the program challenged here. *See Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974).

In times of emergency the government has established controls which limit the return which a person may derive from his property, business or labor. *See,*

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failure to comply with the initial FEA directive that it make payments by January 31, 1975. On February 19, 1976, the company was fined on a plea of guilty to four counts of the indictment. *United States* v. *Gulf Oil Corp., et al.*, Crim. No. 75-231.

[11] The number of companies directed to make payments to other refiners has declined from 53 in March 1975, 40 Fed. Reg. 12466 (1975), to only 19 under FEA's most recent entitlements directive, 41 Fed. Reg. 7461 (Feb. 18, 1976). The diminishing number of refiners required to make these payments is significant in that it gives added emphasis to the point, highly relevant for fifth amendment purposes, that the program is confined in impact to a singled-out category of companies. *See United States* v. *Causby*, 320 U.S. 256 (1946); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914).

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e.g., Block v. *Hirsh*, 256 U.S. 135 (1921); *Western States Meat Packers Ass'n* v. *Dunlop*, 482 F.2d 1401 (TECA 1973); *Local 11, Elec. Workers* v. *Boldt*, 481 F.2d 1392 (TECA), *cert. denied*, 414 U.S. 1902 (1973); *Amalgamated Meat Cutters Union* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971).[12] Government measures also have temporarily restricted the use of property. *See, e.g., United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958). However, this is the first instance in which the government has required one person to grant a cash subsidy directly to another. The implications of such an assertion of governmental authority require no elaboration.

2. The court below failed to provide an adequate answer to Marathon's claim that the entitlements program works a confiscation of Marathon's property. Thus, the court's primary reliance was on *Block* v. *Hirsh*, 256 U.S. 135 (1921). That case held constitutional an emergency rent control program in the District of Columbia during World War I which was justified to the Court as "only a temporary measure." 256 U.S. at 157. TECA quoted from the opinion of this Court as follows (A. 103a):

> "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change. . . ." *Block* v. *Hirsh*, 256 U.S. at 157.

TECA then stated in reference to the entitlements program:

> "'Whether the challenged regulation and enforcement order would pass muster as a long continu-

[12] The first and last of these cases were cited by TECA in *Cities Service*. (A. 103a) The second and third were relied upon by the District Court in *Marathon*. (A. 45a).

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ing response to chronic energy problems need not be determined.' "[13]

Contrary to TECA's perception, the entitlements program must be viewed as "a long continuing response to chronic energy problems". The Allocation Act, first enacted in 1973 with an expiration date of February 28, 1975, has now been extended by Congress four times. The most recent extension, for a period in excess of five years, came before the date of TECA's opinion in *Cities Service* and the date of its order of affirmance in *Marathon*. Under this extension it is reasonable to expect that the entitlements program will continue for several additional years. Accordingly, the constitutionality of the entitlements program should be definitively determined, even if the distinction between a short and a "long continuing response to chronic energy problems" is constitutionally significant.[14]

TECA suggested additionally that the entitlements program limits the use of property and is comparable to rent and price regulations of the kind upheld in *Block* v. *Hirsh*, 256 U.S. 135 (1921), and *Western State Meat Packers Ass'n* v. *Dunlop*, 482 F.2d 1401 (TECA 1973). In those cases, no landlord or meat packer was directed to make cash payments to another landlord or meat packer. The directives here in question are of

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[13] TECA quoted from its opinion in *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351, 362 (TECA), *cert. denied*, 421 U.S. 976 (1975).

[14] We, of course, do not concede that the program passes constitutional muster, even if it is viewed as "temporary." As argued below, we submit that it falls in the category of a direct appropriation of private property rather than a regulatory limitation on the use of property. As Mr. Justice Harlan observed in *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 184 (1958) (dissenting opinion), the fifth amendment requires that compensation be paid for "a temporary confiscation. . . ."

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a quite different order. They require Marathon to make cash payments to its competitors. As stated in *Knox* v. *Lee*, 79 U.S. (12 Wall.) 287 (1871), there is a taking when there is a "direct appropriation" of property. The appropriation of Marathon's monies under the entitlements program is like a condemnation of real property, which is clearly a taking compensable under the fifth amendment. *See, e.g., Kohl* v. *United States*, 91 U.S. 367 (1876). Whether Marathon has demonstrated a substantial diminution in the company's value after it has paid its competitors (a question to which the court below adverted) is not, in this context, any more relevant than it would be to ask whether the land lost through condemnation was all or only a part of that previously owned. As the Court stated in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893), "just compensation . . . is for the property, and not to the owner."

We do not deny that the lines between "regulation" and "taking", between "impairment of use" and "direct appropriation", are often shadowy. As Mr. Justice Black, writing for the Court, noted in *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960):

> "This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful government actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable."[15]

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[15] *See also* Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149 (1971). Professor Sax begins his article with the observation that:

> "Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation. Despite the intensive efforts of commen-

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We submit that the instant program falls clearly on the "direct appropriation" side of the line. In all events, however, the difficulties inherent in deciding when there has been a taking emphasize the importance of review by this Court when the issue arises, as it does here, in the context of a program that is both novel in its features and enormous in its consequences.

3. The "taking" issue cannot be avoided on the ground that some of the costs incurred in the purchase of entitlements may be passed through.[16] Just compensation means something more—namely, a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974). As Congress itself has recognized, "the competitive pressures of the marketplace" have prevented some refiners from recouping substantial amounts of their crude oil costs. Conf. Rep. on "Energy Policy and Conservation Act", S. Rep. No. 94-516, 94th Cong., 1st Sess. 195 (1975). Plainly, this is true of the future as well as the past. There can be no certainty that Marathon will be able to pass on to its customers the amounts that it is required to pay to its competitors.

4. As pointed out above, the entitlements program requires some refiners to make payments to other re-

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tators and judges, our ability to distinguish satisfactorily between 'taking' in the constitutional sense, for which compensation is compelled, and exercises of the police power, for which compensation is not compelled, has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago." (Footnotes omitted.)

[16] Section 4(b)(2)(A) of the Allocation Act, 15 U.S.C. § 753(b)(2)(A), permits a "dollar-for-dollar pass-through of the net increases of crude oil . . . to all marketers or distributors at the retail level".

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finers in order to improve the competitive position of the latter. This is not only a taking; it is, we submit, a taking for non-public use. We assume that the government may elect to subsidize refiners heavily dependent on foreign oil. The fifth amendment, however,

> "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960).

"[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 416 (1922).

The instant case is closely analogous to *Thompson* v. *Consolidated Gas Co.,* 300 U.S. 55 (1937), in which this Court was asked to uphold a proration order that Consolidated Gas and other producers owning pipeline facilities purchase designated quantities of gas from unconnected producers, thus requiring them to fulfill their contracts in part with the natural gas of the unconnected producers, rather than with their own. Justice Brandeis, speaking for a unanimous Court, rejected that program:

> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another." 300 U.S. at 79-80.

5. Review of this case is appropriate for the additional reason that TECA's decisions in *Cities Service* and *Pasco* are inconsistent with the approach adopted by the United States Court of Appeals for the District of Columbia Circuit in *Algonquin, SNG, Inc.* v. *FEA,*

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518 F.2d 1051 (D.C. Cir.), *cert. granted,* 44 U.S.L.W. 3236 (U.S. Nov. 3, 1975) (No. 75-382). In that case, now pending before this Court, the court of appeals declared an oil import license fee program to be in excess of statutory authority because there was no "clear statutory directive" that it be implemented.

The approach of the court of appeals in *Algonquin* to the exercise of executive power is valid here, for section 4(a) of the Allocation Act does not authorize a program of this nature. In the instant case TECA erred in failing to adequately distinguish between the empowering section of the Allocation Act and the objectives which Congress set forth in section 4(b)(1) (A. 89a-92a), and in so doing deviated from its approach in *Consumers Union of the United States, Inc.* v. *Sawhill,* 512 F.2d 1112 (TECA 1975), and *Shell Oil Co.* v. *FEA,* No. 5-13 (TECA, Nov. 11, 1975).

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CONCLUSION

The existing case law—formed in other times to cope with other problems—is inadequate guidance when, under guise of "regulation", the government takes private property for private use without just compensation. This petition should accordingly be granted.

Respectfully submitted,

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OPINIONS BELOW

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 6-10

MARATHON OIL COMPANY, *Plaintiff-Appellant*,

v.

FEDERAL ENERGY ADMINISTRATION, et al.,
Defendants-Appellees.

(FILED FEBRUARY 17, 1976)

Before CHRISTENSEN, VAN OOSTERHOUT and HASTINGS, Judges.

PER CURIAM.

Upon stipulation of the parties, briefing and the filing of the record on appeal in this case on September 18, 1975, was stayed pending this court's decisions in No. 10-7, Pasco, Inc. v. FEA, and No. DC-34, Cities Services Company, et al. v. FEA. The latter cases have now been decided by this court.

A motion to affirm has been filed by the appellees pursuant to TECA Rule 26, and within an extension of time allowed by the court for this purpose.

Appellant's opposition to this motion is based on the contention that *Pasco* and *Cities Service Company* were improperly decided. The validity of these decisions will not be re-examined here.

Cities Service Company, v. FEA, —— F.2d —— (TECA Dec. 31, 1975) (petition for rehearing and suggestion for rehearing *en banc* denied January 28, 1976), and Pasco, Inc. v. FEA, 525 F.2d 1391 (TECA Oct. 14, 1975), are dispositive as against all of the contentions of appellant.

Accordingly, the motion to affirm is hereby granted.

AFFIRMED.

Dated this 17th day of February, 1976.

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TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BEFORE JUDGES CHRISTENSEN, VAN OOSTERHOUT AND HASTINGS

No. 6-10

MARATHON OIL COMPANY, *Plaintiff-Appellant,*

v.

FEDERAL ENERGY ADMINISTRATION, et al.,
Defendants-Appellees,

and

ASHLAND OIL, INC., *Intervenor-Appellee*

and

INDEPENDENT REFINERS ASSOCIATION OF AMERICA,
Amicus Curiae.

Upon consideration of Appellant's Motion for Stay of Mandate and Memorandum of Points and Authorities in Support thereof,

IT IS ORDERED that said motion is GRANTED.

FOR THE COURT:

RUTH H. JACOBSON
Clerk

/s/ by DONNA M. BOLD
Donna M. Bold
Chief Deputy Clerk

February 27, 1976

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 75-36

MARATHON OIL COMPANY, *Plaintiff*,

vs.

FEDERAL ENERGY ADMINISTRATION, and FRANK ZARB, Administrator, *Defendants*,

—and—

ASHLAND OIL, INC., and INDEPENDENT REFINERS ASSOCIATION, *Intervenors*.

OPINION AND ORDER

WALINSKI, J:

Marathon Oil Company once again brings before this Court the question of the federal government's power to regulate the petroleum industry and once again asks this Court to enjoin the Federal Energy Administration's "Entitlements" Program. Specifically, this time Marathon asks this Court, by way of a motion for a temporary restraining order and preliminary injunction, to save Marathon from having to make "entitlements" purchases totalling $11.6 Million before August 31, 1975. For the reasons which hereafter appear the Court has concluded that such relief would not be appropriate and will deny the motions.

Marathon initially brought this suit last January, 1975, when the FEA's entitlements, or Cost Equalization, program was just aborning requesting the same kind of relief. The Court then held a hearing, received evidence, and entered Findings of Fact and Conclusions of Law which denied any relief. The Court further declined to certify a

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constitutional question to the Temporary Emergency Court of Appeals. That Court turned aside an appeal, holding that it did not then have jurisdiction to entertain one.

Now it appears that the entitlements program may come to an end. The Emergency Petroleum Allocation Act of 1973, 15 U.S.C., § 751 *et seq.*, is due to expire on August 31, 1975. While Congress has passed an extension of the Act, reports in the various media of the press indicate that the President will veto the extension. Even as this is being written, news reports continue so to proclaim while also reporting that the Senate Majority Leader will today call on the President to urge extending the Act. Intrepid as reporters are, it is difficult now for this Court to conclude as a matter of fact and law that the Act will indeed expire on Sunday on the basis of this "evidence." However, in the interest of justice, the Court will so presume and consider Marathon's claims.

The Court will make the following factual findings, incorporating, insofar as they are applicable, the Findings of Fact made by this Court on January 31, 1975:

> The evidence shows that the entitlements purchase requirements for August are based on crude oil refinery runs in June, 1975, thereby evidencing a two-month lag between actual crude runs and entitlements purchases. 40 Fed. Reg. 36096 (Aug. 18, 1975).
>
> Weighing the affdavits of Nicholson and Smith offered in evidence by the parties, and received by the Court, the facts are that Marathon has been able to recoup nearly all of its past entitlements purchases. According to the Nicholson statement, even at its worst, Marathon has recovered at least two-thirds of such costs by way of the pass-through provision. Based on this evidence, the Court concludes as a fac-

tual matter that Marathon has not shown any irreparable injury.

Turning to legal conclusions, it is clear that Marathon must show the presence of irreparable injury, the absence of an adequate remedy at law, and the likelihood of success on the merits. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506-07 (1959). Not only has Marathon failed to show irreparable injury, but there is little or no likelihood of success on the merits in the opinion of this Court. Since the January 31st order, several other court have passed on the same claims as Marathon has raised against this same program and have decided them in favor of the government. *See, e.g., Gulf Oil Corp.* v. *Federal Energy Admin.*, 391 F. Supp. 858, 862-4 (W.D. Pa. 1975). Accordingly, the Court will deny all injunctive relief.

Marathon also asks this Court to certify a substantial constitutional question to the Court of Appeals. As in January, the Court declines to do so. *See* cases cited Order January 31, 1975, at pages 21-2.

Pursuant to Rule 65(a)(2), Federal Rules of Civil Procedure, trial on the merits is hereby consolidated with the hearing on the motion for a preliminary injunction. The motions for a temporary restraining order, for a preliminary injunction, and for certification of the constitutional question are denied. Final judgment shall be entered in favor of defendants on all isues.

IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKY
United States District Judge

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 3-5

EXXON CORPORATION, *Plaintiff-Appellant,*

AD HOC COMMITTEE TO SAVE SMALL REFINERS,
Amicus Curiae,

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB,
Defendants-Appellees,

ASHLAND OIL, INC., *Intervenor-Appellee,*

and

INDEPENDENT REFINERS ASSOCIATION OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court
for the District of New Jersey
(No. Civ. 75-150)

No. 6-8

MARATHON OIL COMPANY, *Plaintiff-Appellant,*

AD HOC COMMITTEE TO SAVE SMALL REFINERS,
Amicus Curiae,

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB,
Administrator, *Defendants-Appellees,*

ASHLAND OIL, INC., *Intervenor-Appellee,*

and

INDEPENDENT REFINERS ASSOCIATION OF AMERICA, *Intervenor-Appellee,*

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, and CONSOLIDATED EDISON COMPANY OF NEW YORK, *Amicus Curiae.*

Appeal from the United States District Court
for the Northern District of Ohio
(No. 75-36)

(FILED APRIL 21, 1975)

WILLIAM H. ALLEN, with whom John A. Hodges of Covington & Burling and Robert L. Norris, Jr., were on the brief for Plaintiff-Appellant Exxon Corporation.

Joseph A. Califano, Jr., with whom Jerry L. Shulman and Peter B. Hamilton of Williams, Connolly & Califano were on the brief as Amicus Curiae Ad Hoc Committee to Save Small Refiners.

PATRICIA N. BLAIR, Attorney, Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen. and Stanley D. Rose, Atty., Dept. of Justice were on the brief, for Defendant-Appellees.

FRED W. DROGULA, with whom David Ginsburg and Peter H. Rodgers of Ginsburg, Feldman and Bress; and Arloe W. Mayne, of Counsel, were on the brief, for Intervenor-Appellee Ashland Oil, Inc.

Edwin Jason Dryer for Intervenor-Appellee Independent Refiners Association of America.

George Blow, with whom Kent B. Hampton, Gen. Counsel; John L. Oberdorfer, Gail F. Borden of Patton, Boggs & Blow; and Ralph S. Spritzer, of Counsel, were on the brief for Plaintiff-Appellant Marathon Oil Company.

Joseph A. Califano, Jr., with whom Jerry L. Shulman and Peter B. Hamilton of Williams, Connolly & Califano were on the brief, as Amicus Curiae Ad Hoc Committee to Save Small Refiners.

Patricia N. Blair, Atty. Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen. and Stanley D. Rose, Atty. Dept. of Justice, were on the brief for Defendants-Appellees.

Fred W. Drogula, with whom David Ginsburg and Peter H. Rodgers of Ginsburg, Feldman and Bress were on the brief, for Intervenor-Appellee Ashland Oil, Inc.

Edwin Jason Dryer for Intervenor-Appellee Independent Refiners Association of America.

John J. Adams, with whom Arnold H. Quint of Hunton, Williams, Gay & Gibson, Washington, D.C.; George C. Freeman, Jr. and Allen C. Barringer of Hunton, Williams, Gay & Gibson, Richmond, Va., were on the brief, for Amicus Curiae Long Island Lighting Company, Public Service Electric and Gas Company and Consolidated Edison Company of New York, Inc.

Before: Hastie, Christensen and Hastings, Judges.

Opinion for the Court filed by Judge Christensen.

Dissenting opinion filed by Judge Hastings.

Christensen, Judge: To reach the merits of these appeals involving denial of applications for preliminary injunctions below, we again would have to surmount a juris-

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dictional obstacle already recognized with reference to the absence of certification under 28 U.S.C. § 1292(b).[1]

Both of the above-entitled cases now before us involve here the same jurisdictional problem and essentially the same issues on the merits. Each appellant has asked us to grant an injunction pending appeal—in the case of Marathon "during the pendency of said appeal" and in the case of Exxon "pending its appeal". Otherwise, there has been filed directly with us no application for an injunction either preliminary or permanent, nor have the trial courts certified here any constitutional issues or interlocutory appeals.

Appellants are seeking to review orders of district courts denying motions for preliminary injunction and to certify a substantial constitutional question with reference to the "entitlement program" of the Federal Energy Administration.[2]

The jurisdictional problem arises from § 211(d)(2) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C.A. § 1904 (1975 Supp.) [incorporated into the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 by its Sec. 5(a) (1)]:

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[1] Condor Operating Co. v. Sawhill, —— F.2d ——, (T.E.C.A. Nos. 5-10, 5-11, Feb. 7, 1975). "The purported appeal by the defendants from the order in question does not ameliorate the problem. They [the appellants] had no appeal as of right from the interlocutory order [granting a preliminary injunction]; they had obtained from the district court no certification for the usual interlocutory appeal, nor had they filed application with this court for leave to so appeal within the time prescribed by § 211(d)(2) of the Economic Stabilization Act with reference to 28 U.S.C. § 1292(b). . . ." We held in that case, however, that certification of a constitutional issue by the trial court, not present in the case at bar, invested us with jurisdiction to consider related problems.

[2] 39 Fed. Reg. 42246 (Dec. 4, 1974) as amended 39 Fed. Reg. 44710 (Dec. 27, 1974), 40 Fed. Reg. 2559 (Jan. 13, 1975).

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"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals."

While subdivision (a) of the section thus referred to, upon which the appeals appear premised, provides for appeals as of right from orders granting or denying interlocutory injunctions, subdivision (b) to which the authorization for appeals from such orders are expressly limited by the Economic Stabilization Act as we have seen, reads as follows:

"When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals of a judge thereof shall so order."

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To read § 211(d)(2) of the Economic Stabilization Act with reference to our jurisdiction on appeal to mean that appeals from interlocutory orders denying or granting injunctions may be taken "in accordance with the provisions of section 1292(a) . . ." rather than, or in addition to, "the provisions of section 1292(b) . . ." would do violence to the language of our jurisdictional charter. The two subdivisions were designed to reach different subject matters; one does not lend itself to an interpretation that includes the other, for that would "effectively turn 1292 upon its head". Cf. Tidewater Oil Co. v. United States, 409 U.S. 151 (1972).

The meaning being so facially clear, to seek qualifications or reversal through contextual implications or legislative history seems somewhat gratuitous. Yet both support acceptance of the plain meaning of the employed language.

When the Economic Stabilization Act of 1970 (Pub. L. No. 91-379) was adopted originally no provisions relating to judicial review were specified. Thus, apart from final judgments, any interlocutory orders that district courts might have granted within the parameters of the Administrative Procedure Act and the Rules of Civil Procedure, were reviewable in courts of appeal under § 1292—if granting or denying a preliminary injunction, by appeal as of right by virtue of its subsection (a); and as to any other interlocutory order upon certification below and within the discretion of the appellate court as permitted by its subsection (b).

Section 211 of the Act, specifically providing for, and regulating, judicial review, was added by the Economic Stabilization Act Amendments of 1971 (Pub. L. No. 92-210). The 1973 amendments to the statutes did not change this section.

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The precursor of Section 211 was a bill sent by the President to Congress as a part of a message following the announcement of Phase II to extend and amend the Economic Stabilization Act of 1970. The proposal for the creation of the Temporary Emergency Court of Appeals of the United States was that it should "have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title except that the court shall not have power to issue any interlocutory decree staying or restraining, in whole or in part, any provision of this title, or the effectiveness of any regulation or order issued thereunder." The bill would have provided for the certification of constitutional questions to this court by district courts but would have precluded district courts from granting even permanent injunctions, which would have to be isued by the Temporary Emergency Court of Appeals upon appeal from final declaratory judgments or after hearing in this court upon recommendation of a district judge, or by the Supreme Court.

After holding hearings on the administration bill, the Senate Banking Committee reported a clean bill, S. 2891, which contained the precise language later enacted as Section 211. The explanation contained in the Senate Committee report included the following comments (U.S. Code Cong. & Ad. News pp. 2292-4):

> "The judicial review provision has been written with several important principles in mind: (1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program.
>
> • • • •
>
> "A preliminary limitation is set upon the power of this new court. It may issue, with one exception, no

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interlocutory or temporary order staying or restraining in whole or in part any provision of the Act or the effectiveness of any regulation or order issued pursuant to the Act. The sole exception is that it may issue a temporary injunction restraining the application of a particular regulation or order to a person who is a party to litigation before it. In all other respects the Temporary Emergency Court of Appeals shall have all the powers of a circuit court of appeals."

The Senate Committee's report also states, inter alia:

"Several subsections are devoted to making explicit, the precise authority and limitations on authority that are being placed on the courts considering cases and controversies arising under this Act and in reviewing the decisions of lower courts in these matters.

• • • •

"In order to provide relief for a particular person who may be aggrieved by the operation of this program during the period in which he is attempting to establish his legal position, a district court or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under the Act to a person who is a party to litigation before it. To insure speedy disposition of this matter, an appeal may be taken from the granting of such an injunction from the district court to the Temporary Court of Appeals pursuant to the procedure provided in 28 USC 1292(b) for appealing interlocutory appeals in expedited form."

A floor amendment to the judicial review section was offered by Senator Metcalf and defeated. The amendment, if it had been adopted, among other things, would have permitted review of interlocutory injunctions by the Temporary Emergency Court of Appeals in the usual way they

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would be reviewable by courts of appeal. As Senator Metcalf expressed it: "In short, it would provide what exists today—those legal rights that are presently operating under the Economic Stabilization Act of 1970." Senator Tower made a statement in which he said that the amendment would pose a serious threat to the program. Senator Sparkman said that he hoped the amendment would not be agreed to "because I think it would break up entirely something that we worked long and hard to achieve." 117 *Cong. Rec.* 43478-9 (Nov. 30, 1971).

The House version, H.R. 11309 was passed on Dec. 10, 1971. Specifically as to interlocutory appeals it would have provided: "The Temporary Emergency Court of Appeals shall not have the power to issue any interlocutory decree staying or restraining, in whole or in part, any provision of this title or the effectiveness of any regulation or order issued under this title." Permanent injunctions would have been issued "by the Temporary Emergency Court of Appeals upon appeal, or, after hearing, upon recommendation of a United States district court or judge thereof. Such an injunction may also be issued by the United States Supreme Court as provided for by this section."

Because of differences in the House and Senate versions, the proposed amendments were sent to a conference committee which adopted the Senate version. The conference report states in part that "[t]he House bill differed from the Senate bill . . . in that . . . it gave no injunctive authority to the district courts." S. Rep. No. 92-579, 92d Cong., 1st Sess. 20-21 (1971). The conference report was agreed to by both houses and the Act, reflecting the Senate version, was signed into law on Dec. 22, 1971.

The legislative history makes plain at least that alteration of traditional judicial review provisions was intended. And there is nothing to indicate that the specific provisions for review as expressed in the Act were not intended.

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In addition to the plain language of the particular subsection under discussion, and the legislative history bearing upon it, the context of the entire section itself demonstrates that the changes reflected in § 211(d)(2) were both intended and carefully considered.

The grant to this court of exclusive jurisdiction over all appeals from district courts of the United States in cases and controversies arising under this title is limited by the phrase, "Except as otherwise provided in this section . . ." (§ 211(b)(2)).

The certification by district courts of constitutional issues is required before this court may reach them except as a part of jurisdiction otherwise granted. Subject to this power of determination upon certification below, ". . . no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence." (§ 211(d)(1).)

As noticed above, however, "A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it", but appeals from such interlocutory decisions by a district court "may be taken in accordance with . . . section 1292 (b) . . . ." (§ 211(d)(2).) "Except as provided in subsection (d) of this section, no interlocutory or permanent injunction . . . shall be granted by any district court of the United States. . . ." (§ 211(e)(1).)

If (d)(2) were to be read as meaning that appeals may be taken in accordance with § 1292(a), there would be a direct contradiction in terms. If the subsection were thought to be merely permissive in this respect, leaving subsection (a) to be utilized as a matter of right anyway,

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reference to subdivision (b) would indicate some mindless aberration which surely this court should not imply, and cannot fairly imply for the reasons heretofore discussed and those to be stated later. Equally as insupportable would be to read the reference to subsection (b) as intending to provide: "In addition to the jurisdiction provided by subsection (a) above, the Temporary Emergency Court of Appeals shall have the jurisdiction provided by subsection (b) to review interlocutory orders." The "puzzling" nature of this section which still remains in the view of Exxon if one of these other interpretations is adopted can only be resolved by accepting the plain language of the statute.

Thus, it is clear from (d)(2) in view of all other available guides, that any appeal to this court from an interlocutory order granting or denying a preliminary injunction may be taken only on certification by the district court. Why should this be more strange than certification procedure for reference to this court of interlocutory constitutional questions? If there were an appeal as of right from orders denying preliminary injunctions or restraining orders, the certification of interlocutory constitutional problems would be rather meaningless; all a party seeking an interim review here would have to do would be to request and be refused a restraining order or preliminary injunction. Appeals as of right concerning both interim constitutional problems and interlocutory injunction decisions could well have been thought by Congress to invite delays in the progress of these cases to final judgment in the district court. Our experience has been that district courts have been perhaps overly prone to certify interim constitutional problems to this court. See *e.g.*, Shapp v. Simon, 510 F.2d 379 (T.E.C.A. 1975). There is little reason to suppose that if the requirement of § 211(d)(2) is adhered to substantial questions will not be certified as to rulings on applications for interlocutory injunctions where any reasonable justification appears.

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Should this not prove correct in every instance, parties still would not be left "at the mercy" of judges who unreasonably refuse to certify pursuant to the reference of § 211(d)(2), although this possibility has not been thought to constitute any real objection to the existence of discretionary appeals in ordinary context. Subsection (d)(2) itself provides in effect that the Temporary Emergency Court of Appeals, in addition to district courts, may enjoin temporarily the application of a particular regulation or order to a party upon original application here as well as in connection with certified interlocutory appeals from orders of district courts. In Pacific Coast Meat Job. Ass'n., Inc. v. Cost of Living Coun., 481 F.2d 1388 (T.E.C.A. 1973), a case cited by Exxon as one at variance with the present interpretation of § 211(d)(2), this court in addition to the usual appeal had before it an original application for an injunction filed with this court which it denied in connection with its reversal of the judgment of the lower court. While the question was not discussed, in our present view we in any event did have jurisdiction of the original application and perhaps pendant jurisdiction of the appeal.

Also relied upon by Exxon as being inconsistent with the *Condor* review of § 211(d)(2) is County of Nassau v. Cost of Living Council, 499 F.2d 1340 (T.E.C.A. 1974), and McGuire Shaft & Tunnel Corp. v. Local u. No. 1791, U.M.W., 475 F.2d 1209 (T.E.C.A.), *cert. denied*, 412 U.S. 958 (1973). In the same connection could have been added League of Vol. Hosp. & H. of N.Y. v. Local 1199, Drug & H.U., 490 F.2d 1398 (T.E.C.A. 1973). It is true that a threshold question of jurisdiction was considered in *County of Nassau,* but this was made to depend solely upon whether there was any distinction under the circumstances between temporary restraining orders and preliminary injunctions; insofar as the opinion discloses the problem with which we are confronted here was neither presented nor ruled upon. *McGuire Shaft & Tunnel Corp.* did not involve a § 211 situa-

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tion at all, but turned upon § 210(a), since relief was sought for violation of administrative orders, not against their application or operation, this court stating (475 F.2d at 1214):

> "Clearly, the limitations on the federal courts' authority to enjoin agencies of the government in the execution of the act, orders, and regulations thereunder were not considered synonymous with the right of an individual injured by violations of the program to enjoin those violations."

League of Voluntary Hospitals did not consider the problem either. But the latter decision underscores the dichotomy, if not paradox, which is presented by an interlocutory appeal as of right from an order granting or denying a preliminary injunction through which constitutional issues can be adjudicated here, and the requirement of certification to this court of constitutional issues as a condition for interlocutory review.

We no longer can delay directly facing up to the jurisdictional problem recognized but determined only in passing in *Condor*. Not only do we have a continuing duty to inquire into our jurisdiction as such, but we should be punctilious also in assuring ourselves that safeguards established by Congress against excessive interlocutory demands upon us to the undue delay of final decision below are not disregarded.

If, as the parties claim, every refusal of a preliminary injunction as well as every such interlocutory injunction can be appealed as of right by any party irrespective of the trial court's conviction that appeal would be frivolous or would not advance the final determination of the cause and thus should not be certified to this court, a pattern for substantial delay of final determination in almost every such case would be engrained into the law contrary to the ex-

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pressed intent of Congress.[3] Moreover, such uncertified appeals, which usually involve constitutional attacks, in effect would wash out any significance of § 211(c) concerning the certification of interlocutory constitutional issues. The interruption of proceedings in district courts by appeals of right from all of such interlocutory orders, which are customarily sought in the first instance, is a prospect which the Congress did not have to invite, whether wise or unwise. Such appeals however unmeritorious are always time consuming, not infrequently premature and often present problems which could be better considered by us following development of a more adequate record by the trial courts.

There, indeed, may be much to commend the Congressional plan in preference to such a system for unlimited appeal of orders granting or denying preliminary injunctions. Groundless interlocutory appeals under the Act may be screened by the district court beneficially in the first instance, as in the case of the review of constitutional problems. Improvident interlocutory appeals should not be encouraged. If the granting of preliminary relief against application of a regulation or order is improperly refused and the matter is deemed of sufficient importance, our

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[3] Tidewater Oil Co. v. United States, 409 U.S. 151 (1972), construing in different context § 1292(b) as pertaining to orders other than those granting or denying preliminary injunctions is not inconsistent in the present entirely dissimilar context with its applicability to the latter orders in view of the express provisions of the Economic Stabilization Act. It seems quite clear in the present context that when Congress expressly stated in a single subsection that a "district court . . . may enjoin temporarily . . . the application of a particular regulation or order . . ." and that "[a]ppeals from interlocutory decisions by a district court . . . under this paragraph may be taken in accordance with the provisions of section 1292 (b) . . .", it did not mean that such appeals could not be taken by virtue of subsection (b) if the order was one "enjoined [ing] temporarily . . . the application of a particular regulation or order. . . ."

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jurisdiction may be invoked by an original application which we can reject without interruption of the proceedings below, or grant if a sufficient showing is made to warrant this action. Should the district court refuse to certify an interlocutory appeal from an order granting an injunction, the case in all probability better could proceed to final determination below anyway unless this court is convinced upon a clear showing of the absence of legal foundation that prohibition, or other extraordinary remedy should issue. If the granting of such preliminary injunction is within the discretion of the trial court and thus not amenable to extraordinary relief here, the probability of our overruling the exercise of that discretion even on interlocutory appeal could be minimal. But irrespective of whether the system mandated by Congress is the best one, we are bound to give it effect, no constitutional obstacle appearing.

The appeals are hereby dismissed for lack of jurisdiction in this court.

TECA

No. 3-5 Exxon Corporation v. Federal Energy Administration

No. 6-8 Marathon Oil Company v. Federal Energy Administration

Hastings, Judge, dissenting. The statement in Section 211(d)(2) of the Economic Stabilization Act, 12 U.S.C. § 1904 note, that appeals from decisions of district courts respecting injunctions "may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code . . . ," presents this court with a difficult question of interpretation. There seem to be two possible interpretations of the provision. Either the mention of § 1292(b) precludes appeals pursuant to § 1292(a)(1), or the latter provision remains available. The two interpretations are

each, at least in some respect, unsatisfactory. In light of the congressional policy behind the judicial review provisions of the Economic Stabilization Act, I find the majority's view that § 1292(a)(1) review is precluded the far less satisfactory interpretation and I therefore dissent.

The majority holds that it was the intent of Congress to limit the appellate jurisdiction of the Temporary Emergency Court of Appeals over orders granting or denying preliminary injunctions to those which have been certified by the district court under 28 U.S.C. § 1292(b). A complete review of the legislative history of the Act reveals only a single mention of 28 U.S.C. § 1292(b) in all of the committee reports and debates on the floor of the House and Senate. That single sentence, in the Senate committee report, does little more than restate the language of the statute:

> To insure speedy disposition of this matter, an appeal may be taken from the granting of such an injunction from the district court to the Temporary Emergency Court of Appeals pursuant to the procedure provided in 28 USC 1292(b) for appealing interlocutory appeals in expedited form. S. Rep. No. 92-507, 92d Cong., 1st Sess. 12 (1971); U.S. Code Cong. & Ad. News 2294 (1971).

I cannot join the majority's conclusion that any decision to limit review to the provisions of § 1292(b) was "both intended and carefully considered."

If Congress had in fact intended to restrict review of orders concerning injunctions to those certified by the district court, any careful consideration of the language of § 1292(b) and the cases which have interpreted it would have revealed that § 1292 would not be an appropriate vehicle to "insure speedy disposition" of orders respecting preliminary injunctions.

The Supreme Court in *Tidewater Oil Co.* v. *United States,* 409 U.S. 151 (1972), concluded that the statute's legislative history demonstrated "that § 1292(b) was intended to establish jurisdiction in the courts of appeals to review interlocutory orders, other than those specified in § 1292(a), in civil cases in which they would have jurisdiction were the judgments final." *Id.* at 168 (footnote omitted). The Court further stated that "§ 1292(b) was intended to supplement § 1292(a), not to provide a substitute for it." *Id.* at 168 n. 41. The Court went on to consider, in dicta, the possible usefulness of § 1292(b) in securing review of orders concerning preliminary injunctions in a class of cases where resort to § 1292(a) was precluded. The Court said, "[T]he fact is that permitting interlocutory appeal under § 1292(b) would not bring these orders and the related evidence before the courts of appeals since they come within § 1292(a)(1)." *Id.* at 172 n. 47. The implication of this observation for our jurisdictional question is clear. If, as the majority holds, § 211(d)(2) of the Economic Stabilization Act prevents use of § 1292(a)(1) to appeal orders granting or denying preliminary injunctions, then the certification procedure of § 1292(b) could not be used to appeal such orders either.

The Supreme Court's observation was based on careful consideration of legislative history. The Court's analysis is persuasive and should be followed here. But even if we were to reject as dicta the Supreme Court's conclusion that § 1292(b) is wholly unavailable to review a preliminary injunction decision, § 1292(b), if available, would be a very awkward and inappropriate mechanism for such review.

The language of 28 U.S.C. § 1292(b) only makes sense if it supplements review as of right from orders concerning preliminary injunctions rather than supplants it. The section begins "when a district judge, in making in a civil action an order not otherwise appealable under this section.

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. . ." Since § 1292(a)(1) permits review of injunctive orders, by its own terms, the procedures of § 1292(b) are not to be applied to appeals from injunctions.

The standards for certification under § 1292(b) were not designed to be and are not suitable for application to preliminary injunctions. Section 1292(b) requires a "controlling question of law," but the controlling issues in a preliminary injunction proceeding are in large part factual, such as whether there is irreparable harm to the plaintiff, whether harm to the defendant if an injunction is granted would outweigh benefit to the plaintiff, and whether an injunction would serve the public interest. There is substantial precedent supporting the view that § 1292(b) certification is inappropriate in matters that lie within the discretion of the district court,[1] but the issuance of a preliminary injunction is "committed to the sound judicial discretion of the trial court." *League of Voluntary Hospitals* v. *Local 1199, Drug & Hospital Union*, T.E.C.A., 490 F.2d 1398, 1401 (1973).

While the legislative history of the Economic Stabilization Act fails to demonstrate a clear intent to restrict review of decisions about preliminary injunctions to the procedures of § 1292(b), it does contain a detailed statement of the congressional policies which the judicial review provisions were designed to implement:

> The judicial review provision has been written with several important principles in mind: (1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program.

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[1] 9 MOORE'S FEDERAL PRACTICE ¶ 110.22[2] at 261 (2d ed. 1973); C. WRIGHT, LAW OF FEDERAL COURTS § 102 at 463 (2d ed. 1970). *But see Katz* v. *Carte Blanche Corp.*, 3 Cir., 496 F.2d 747, 752-756, *cert. denied*, —— U.S. ——, 95 S.Ct. 152 (1974).

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S. REP. NO. 92-507, 92d Cong., 1st Sess, 10 (1971); U.S. CODE CONG. & AD. NEWS 2292 (1971).

Limiting appeals from orders concerning preliminary injunctions to those certified pursuant to § 1292(b) would be likely to produce delay and inconsistency rather than further the legislative intent. Considering the inapplicability of the requirements for a certification under § 1292(b) to preliminary injunction questions, a district court would often be correct in refusing to certify its order for appellate review. As a result, district court orders inconsistent with decisions of the Temporary Emergency Court of Appeals could remain in effect for substantial periods of time. While a party who had been denied preliminary relief in the district court could petition our court directly for an injunction, the party aggrieved by the issuance of an injunction by the district court would have no such alternative available. Thus, the situation Congress most feared, of injunctions creating breaks or stays in the program, is furthered by limiting review to § 1292(b).

The general design of the jurisdictional review provisions of the Economic Stabilization Act is to limit the relative authority of the district courts and to concentrate authority in our court. Limiting review of injunction orders to those properly certified under § 1292(b) would make district courts in cases arising under the Economic Stabilization and Emergency Petroleum Allocation Acts more powerful than they would be in other cases and our court less powerful than other courts of appeals. The district courts would have what the Supreme Court has described as "virtually unlimited authority over the parties in an injunctive proceeding." *Sampson* v. *Murray*, 415 U.S. 61, 87 (1974).

The holding of the majority here that § 1292(b) is the only avenue of appeal for orders respecting preliminary injunctions is not only inconsistent with the well-developed interpretation of § 1292(b) and the legislative policies be-

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hind the Economic Stabilization Act, but it is also inconsistent with the prior uniform practice of our court in hearing appeals from preliminary injunction decisions without requiring a § 1292(b) certification.

In *Pacific Coast Meat Jobbers Ass'n* v. *Cost of Living Council*, T.E.C.A., 481 F.2d 1388 (1973), our court heard and decided an appeal by private parties which had been denied a preliminary injunction. While the court also had before it an original application for a preliminary injunction, the opinion of the court leaves no question that it was deciding both the preliminary application and the appeal. In *League of Voluntary Hospitals, supra*, the court stated that the case before it was "an appeal, pursuant to Section 211 of the Economic Stabilization Act" from an order granting a preliminary injunction, yet the court did not find it necessary to discuss any possible jurisdictional obstacles to its hearing the case.

In *County of Nassau* v. *Cost of Living Council*, T.E.C.A., 499 F.2d 1340 (1974), our court heard appeals by a government agency from a series of decisions of a district court granting among other relief, a temporary restraining order. In *County of Nassau* the jurisdictional question was explicitly considered. The court said:

> At the threshold a question arises whether the temporary restraining order against the COLC's temporary order is appealable. We hold that it is appealable under the rationale of Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (decided Feb. 19, 1974) . . . . 499 F.2d at 1343.

In *Sampson* v. *Murray*, the Supreme Court held that a temporary restraining order would be considered as a preliminary injunction so that review under 28 U.S.C. § 1292(a)(1) would be available. The Court reasoned:

> A district court, if it were able to shield its orders from appellate review merely by designating them as

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> temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. 415 U.S. at 86-87.

Since *Sampson* was an interpretation of § 1292(a)(1), our court's reliance upon that case is an implicit holding that the provisions of 28 U.S.C. § 1292(a)(1) permit our court to hear appeals from decisions concerning preliminary injunctions without a certification.

In light of this precedent, the inutility of § 1292(b) in reviewing preliminary injunction orders and the legislative policies behind the judicial review provisions of the Economic Stabilization Act, I would hold that § 211(d)(2) of the Act does not preclude this court's jurisdiction over appeals pursuant to 28 U.S.C. § 1292(a)(1). While I recognize that this holding would render the reference to § 1292(b) in § 211(d)(2) superfluous, I believe it achieves a far more satisfactory result than the holding of the majority.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 75-36

MEMORANDUM AND ORDER

MARATHON OIL COMPANY, *Plaintiff*,

v.

FEDERAL ENERGY ADMINISTRATION, et al., *Defendants*.

* * *

WALINSKI, J.:

This cause is before the Court on a motion for a preliminary injunction. Because of the nature of the statute and regulation involved herein and the relief sought, this Court has caused the matter to be expedited in every way. The Court held a hearing on the motion on January 29, 1975, and permitted the Ashland Oil Company to intervene, pursuant to Rule 24(a), Federal Rules of Civil Procedure, as a party defendant. The Court also permitted the Independent Refiner's Association of America to appear as an amicus curiae. All have filed briefs on the matters raised by the motion.

FINDINGS OF FACT

Plaintiff, Marathon Oil Company (hereinafter Marathon), is a corporation organized and existing under the laws of the State of Ohio, with its corporate offices and principal place of business in Findlay, Ohio. Marathon is an integrated medium-sized oil company which produces, transports, refines and sells crude oil in the United States and abroad. Its principal markets for petroleum products in the United States are in the Midwest and in the Southeast.

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Defendant, Federal Energy Administration (hereinafter FEA), is an agency and instrumentality of the United States under the Federal Energy Administration Act of 1974, 15 U.S.C., § 761 *et seq.;* and it was established by Executive Order No. 11,790 (June 27, 1974). The FEA is responsible for the administration of the Emergency Petroleum Allocation Act of 1973, as amended (hereinafter the EPAA), 15 U.S.C., § 751 *et seq.* This responsibility previously was exercised by the Federal Energy Office (hereinafter FEO) established by Executive Order No. 11,743, 3 C.F.R., § 376 (Supp. 1974).

Defendant Frank G. Zarb is Administrator of FEA. The authority which the EPAA vests in the President was delegated to the Administrator by Executive Order No. 11,790 (June 27, 1974).

Defendant-intervenor, Ashland Oil, Incorporated (hereinafter Ashland), is an "independent refiner" as that term is defined in § 3 of the EPAA and the regulations issued thereunder.

The EPAA became law on November 27, 1973. Section 4(a) thereof required the President to promulgate regulations for the mandatory allocation of crude oil, residual fuel oil and refined petroleum products in amounts, and at prices to be specified by the regulations. Those regulations were to implement, "to the maximum extent practicable", certain objectives as set forth in § 4(b) of the Act.

Among others these objectives included the:

> "• • • preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
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equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

• • •

economic efficiency; and

minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms."

The term "independent refiner" is defined in § 3(3) of the EPAA as any refiner that obtains more than 70 percent of its refinery input from sources not subject to its control and which markets a substantial portion of its gasoline through independent marketers. The term "small refiner" is defined in § 3(4) as any refiner whose total refinery capacity does not exceed 175,000 barrels per day.

Thereafter, the President established the Federal Energy Office which adopted Mandatory Fuel Allocation Rules. These were revised by the FEO on January 14, 1974, when it issued the Petroleum Allocation and Price Regulations (39 Federal Register 1924, *et seq.* January 15, 1974).

One aspect of the FEO's initial regulatory scheme was a two-tier pricing system which had its antecedents in the President's Economic Stabilization Program.

In August of 1973, the Cost of Living Council (hereinafter CLC), as a part of Phase IV of the Economic Stabilization Program, was charged with devising a system of price controls for the petroleum industry. At that time the United States was becoming increasingly dependent on foreign crude oil to meet its supply needs because domestic producers were not supplying as much of our needs as

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formerly. Foreign crude oil prices, moreover, were in the process of rising substantially above their previous levels due to concerted action by the Organization of Petroleum Exporting Countries (hereinafter OPEC). This rise in prices began in 1971 when the members of OPEC commenced negotiations on a series of "settlements" with the major international oil producers; each new settlement was somewhat higher than the last and further drove up the price of crude oil on the world market, including the price of domestic crude oil.

Thus, the CLC determined that any system of price controls to be imposed on the petroleum industry must minimize as much as possible the inflationary impact of world-wide oil price increases on the United States economy, while at the same time encouraging increased domestic production of crude oil. To accomplish those dual objectives, CLC decided that most domestically-produced crude oil should be subject to ceiling price controls, but that some domestically-produced crude oil should be exempted from ceiling price controls in order to stimulate domestic production. The CLC also determined that the first sale of imported crude oil must be exempted from ceiling prices because it would not be possible to obtain sufficient imported supplies at a controlled price. The result was a two-tier pricing system for crude oil, promulgated by the CLC in August, 1973, and subsequently adopted on January 14, 1974 in the FEO Mandatory Petroleum Allocation and Price Regulations.

Under the two-tier pricing system, FEA imposed a ceiling price on all domestic crude oil produced from a given property to the extent that the level of crude oil production from this property falls at or below the level of production from the same property in the same month of 1972 ("old" oil). Crude oil produced in excess of 1972 production levels from the same property ("new" oil) is exempt from price controls, and each barrel of new oil

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produced releases from price controls a barrel of old oil ("released" oil). The first sale of imported crude oil into the United States remains free from price controls under FEA regulations, and the first sale of crude oil produced from "stripper" wells (wells producing less than 10 barrels per day) also is exempted from price controls under § 4(e)(2)(A) of the EPAA.

The present ceiling price on old oil is basically the May 15, 1973 posted price, plus $1.35, or approximately $5.25 per barrel. When the CLC imposed controls on old domestic crude oil in August, 1973, the per barrel ceiling price was set at May 15, 1973 posted prices plus $.35, resulting in a price of approximately $4.25 per barrel. The price remained at that level until it was raised by $1.00 to the present level of approximately $5.25 per barrel on December 19, 1973. During that same time period, however, prices on representative foreign crude oil rose by more than $8.00 per barrel from $3.07 per barrel in August, 1973, to approximately $11.65 per barrel in January, 1974. The increase in foreign crude oil prices has further stimulated an increase in the price of uncontrolled domestic crude oil, i.e., new, released and stripper-well oil, from an August, 1973 price of approximately $5.00 per barrel to a current price in excess of $10.00 per barrel. Presently, approximately 60 percent of all crude oil runs to stills in the United States consists of oil not subject to FEA price controls, while the balance, FEA price controlled old oil, represents approximately 40 percent of all crude oil runs to stills.

The great disparity between the prices of uncontrolled and controlled crude oil in the United States, which is a direct result of FEA's two-tier pricing system, was not, however, having an equal impact on all refiners prior to the cost equalization program. Instead, there existed uneven access to price controlled "old" oil; most major integrated oil companies had far greater access to old oil

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than did the small independent refiners, as a class. The result was that those refiners, including some majors, which were forced to rely more heavily on uncontrolled domestic or foreign crude oil incurred higher composite crude costs in the refining of products than those which had greater access to price-controlled old oil. The uneven distribution of the benefits of old oil among refiners, which resulted in significant input crude cost differentials, was translated into significant price differentials among refiners in their sales of refined petroleum products under applicable FEA price regulations.

Under FEA price regulations for refiners, a refiner can charge no more than its May 15, 1973 price on a given product, plus an adjustment for net increase since May, 1973, in the cost of crude oil and purchased refined products. While May 15, 1973 profit margins among refiners varied only slightly, the largest contribution to the varying prices charged by refiners has been the difference in average weighted crude costs attributable to the two-tier pricing system on crude oil. Those differences have been passed on at the wholesale and retail level since such resellers, under FEA regulations, while they must maintain their May 15, 1973 mark-up on a product, may pass through on a dollar-for-dollar basis any increased product costs from their suppliers.

During the shortages of refined petroleum products created by the Arab oil embargo in the Winter and Spring of 1974, the cost differentials resulting from the different proportions of old oil which refiners used to compute their overall crude costs were passed through easily to the ultimate consumer. The result was, of course, that consumers were paying significantly different prices for the same refined product. With the termination of the Arab oil embargo and a re-emergence of adequate supplies, competition began to reappear for certain products. Although the differences in refiners' average crude oil costs continued,

competition in the marketing of refined products has caused a recent narrowing in retail prices.

In order to remain competitive, however, many of those refiners with higher input costs due to their low proportion of old oil, and those marketers to whom they sell, have been forced to endure a severe cost-price squeeze. Many small and independent refiners and independent marketers —unable to absorb the full amount of such costs—were forced to charge higher prices for their products than their competitors with a resulting loss of market shares. Thus, the two-tier crude oil pricing structure, which was deemed necessary to minimize the inflationary impact of world crude oil prices and to maintain incentives for domestic production, generated economic distortions and interfered with market machanisms, including the continued existence of independent refiners because of the uneven distribution of old oil among all of American refiners.

The regulatory scheme also included a provision that the supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of the crude oil allocation program.

The President's program also included a mandatory buy/sell feature under which each "small" and "independent" refiner (as those terms are defined in §§ 3(3) and 3(4) of the Allocation Act) is entitled to purchase a varying quantity of crude oil, the amount of which is calculated in accordance with rules set forth in 10 C.F.R. § 211.65, from the 15 United States refiners which are neither "small" nor "independent" within the meaning of the EPAA.

The FEA's special pricing rules governing sales of crude oil under the buy/sell program (10 C.F.R. § 212.94) provide that a refiner-seller may charge no more than its

weighted average price of all crude oil delivered to it in the area of the country where the sale is made in the month the sale is made, plus certain adjustments for handling, transportation, and differing crude grades. The program also allows a refiner-seller to pass through on a dollar-for-dollar basis in its prices for refined petroleum products any increased costs related to replacing crude sold under the mandatory buy/sell program with higher-priced crude oil.

The purpose of the buy/sell program is to correct supply imbalances between the major integrated refiners, which have relatively greater direct control over both domestic and foreign crude oil, and the small and independent refiners, which have been disproportionately dependent on foreign crude oil in a period of shortages. Nevertheless, the FEA pricing rules for buy/sell program sales, which require sales be made basically at a refiner-seller's weighted average price, did give small and independent refiners some access to the benefits of price-contorlled old oil.

The buy/sell program, however, proved to be inequitable for several reasons. Firstly, the firms entitled to buy the highest volume of crude oil because of inadequate supplies were often not necessarily the firms suffering the most from a lack of low cost crude oil. Secondly, it often happened that a buyer obtained crude oil from a seller who was himself suffering from a lack of low cost crude oil. Thirdly, since the buy/sell program was designed principally as a supply device for small independent refiners, it did not seek to equalize the crude oil costs among those refiners who were not qualified as buyers and suffered from a lack of low cost crude oil. It was for these reasons, among others, that the FEA designed what it calls the Cost Equalization Program (hereinafter CEP).

Under the CEP, the FEA issues to each domestic refiner a number of "entitlements" which is equal to that refiner's proportionate share of the total monthly old oil

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supply existing in the United States, with an upward adjustment in the number of entitlements issued to those refiners who qualify for a "small refiner bias." Additionally in January, 1975, a limited number of eligible firms (including refiners) who import residual fuel oil and home heating oil (which includes no. 2-D diesel fuel) have been issued entitlements based on the volume of such product imported. (The FEA has removed importers from the coverage of the CEP by regulation effective February 1, 1975.)

An "entitlement" is the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil receipts in a particular month. A refiner with more than its proportionate share of the national old oil supply must buy a sufficient number of entitlements to cover its excess barrels of old oil. A refiner with less than its proportionate share of the national old oil supply (and certain refiners who receive a small refiner bias in the issuance of entitlements) will have an excess number of entitlements which they must sell to other refiners. Those eligible "importers" which have been issued entitlements must similarly sell their entitlements to those refiners who need them to cover the refiner's excess supplies of old oil. Because the purpose of the CEP is to remove the inequitable conditions caused by the two-tier pricing system, the FEA has set the price of entitlements for the month of January at $5.00 with reference to the current differential between controlled and uncontrolled crude oil prices (39 Fed. Reg. 43103, December 10, 1974).

To determine the precise number of entitlements issuable to a refiner (a refiner's proportionate share of the total old oil supply in a given month), the FEA computes an "adjusted national old oil supply ratio" for each month. This ratio is the volume of old oil included in the aggregate crude oil receipts for all domestic refiners, expressed as a percentage of the total volume of crude oil runs to

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stills for all refiners for that month. For example, if the total number of barrels of old oil was 200 million and the total number of crude runs is 500 million barrels, the old oil supply ratio is 2/5 or 40 percent. Thus, if all old oil were equitably allocated among all domestic refiners, each refiner would have crude oil runs which consist of 40 percent old oil.

Since, however, the FEA also issues entitlements to certain importers of product and to small refiners in a number adjusted upward in accordance with a "small refiner bias", the total volume of old oil used to calculate the national ratio of old oil must be reduced by the number of entitlements so issued. Having established an adjusted national old oil supply ratio, the FEA applies this ratio to each domestic refiner's volume of crude oil runs, and then issues to each refiner a sufficient number of entitlements to cover that percentage of its crude runs.

In addition to the number of entitlements it would otherwise receive as a refiner, a small refiner receives a further number of entitlements under a small refiner bias. Small refiners with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month are issued additional entitlements for each day of that month in a number equal to a designated percentage of its average daily volume, with the percentage basis becoming greater as crude oil runs become smaller. 10 C.F.R., § 211.67(2).

The FEA created the small refiner bias in recognition of three facts. First, small refiners have relatively higher operating costs and capital expenditures than other refiners. Second, small refiners have traditionally, and must continue, to market their products at a lower price than the products of the major branded refiners in order to remain competitive. Third, there is a need to preserve the historical position of small refiners.

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The FEA concluded that the CEP should not begin and end with the refinery level because that would not place some marketers or retailers in a competitive position. Therefore, the FEA also designed its CEP so that entitlements were made available to some firms which import finished products such as no. 2 heating oil and residual fuel oil.

All refiners and importers who sell entitlements are required to count their proceeds on entitlement sales as a reduction in crude oil or product costs. All refiners who must buy entitlements are permitted to count the cost thereof as an addition to crude oil costs. FEA price regulations further permit these increased crude oil costs to be passed through to the ultimate consumer. It is not required that these higher costs be passed along; rather, that decision is left to each refiner to make for himself.

On January 10, 1975, the FEA issued an order assigning entitlements for refinery runs in the month of November, 1974, and requiring that certain refiners (including Marathon) purchase specified numbers of entitlements from other refiners (or importers) on or before January 31, 1975. This order was published in the Federal Register January 13, 1975. 40 Fed. Reg. 2559 (1975). Marathon was ordered to purchase from other refiners (or importers) 721,622 entitlements at $5.00 each, a total of $3,608,110, by January 31, 1975. The entitlements regulation provides that FEA will issue entitlement purchase orders in each subsequent month at least through August 31, 1975, the date of expiration of the Act.

On January 13, 1975, Marathon filed applications and supporting documents with FEA requesting (1) a stay of Marathon's obligations to purchase entitlements pursuant to the CEP, and (2) exceptional relief from Marathon's purchase requirements under this program. On January 23, 1975, the Office of Exceptions and Appeals of the FEA denied the applications for a stay.

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The Office of Exceptions and Appeals presently has under active consideration, pursuant to expedited emergency procedures (39 Fed. Reg. 43814 (1974)), the application by Marathon for an exception and has already requested supplemental information from Marathon.

Marathon has failed to establish that it is likely to suffer irreparable harm in the event an injunction is denied, or indeed any harm at all. The evidence tends to show that as a result of the CEP, Marathon will be placed in a slightly better position as respects crude oil costs and competition than it was in before the price of domestic crude oil was frozen.

The evidence tends to show that a delay in the implementation of the CEP caused by an injunction would force the FEA to recalculate its whole entitlements program. Moreover, it would continue the effects of a regulatory scheme that even the government concedes has resulted in severe inequities as to crude oil costs which appear to have fostered an unhealthy lack of competition in the oil industry.

Marathon has not established that it will be unable to pass along the costs of its entitlement purchases. In fact, it concedes that it will be able to pass at least some of the costs. Moreover, it also concedes that the CEP does not threaten its existence, and offers no evidence to rebut the FEA's showing that further delay in implementation of CEP will result in more damage to competition within the oil industry.

Conclusions of Law

This Court has jurisdiction of this action under § 5(a)(1) of the EPAA, which makes §§ 205-211 of the Economic Stabilization Act of 1970 (hereinafter ESA) (reprinted as a note to 12 U.S.C., § 1904) applicable to a regulation promulgated under § 4(a) of the EPAA; and §§ 210(a) and 211(a) of the ESA.

Section 211(d) of the ESA provides that:

> "* * * no regulations of any agency exercising authority under this title shall be enjoined or set aside in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in [5 U.S.C., § 706(2)], and no order of such agency shall be enjoined or set aside in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence."

The section further provides that:

> "[a] district court of the United States * * * may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it."

Section 211(e)(1) provides that:

> "[e]xcept as provided [in § 211(d)] no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof."

Thus, under the foregoing, this Court may enjoin the CEP as to Marathon alone, only if it finds that the regulation was issued in excess of the FEA's authority, or is arbitrary or capricious, or if the regulation was adopted without procedure required by law, or if it is unsupported by substantial evidence. The Court will treat each of these grounds in turn.

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Marathon contends that the CEP exceeds the FEA's authority under § 4(a) of the EPAA because the CEP does not allocate oil. Instead, it is argued, the CEP is an administrative subsidy program which requires some refiners to finance other refiners and importers in their purchases of crude oil. Thus, since the CEP is not an allocation program, it must be invalid.

The Court does not find this argument well taken. It seems to suggest, as the FEA points out, that the CEP cannot qualify as an allocation program simply because it does not require the physical transfer of crude oil among refiners. Such a physical transfer requirement would indeed seem to have added more administrative burdens as well as increased costs to an already burdened industry producing an already very expensive product—to say nothing of the problems for FEA. Hence, the CEP is clearly an allocation program since it achieves the same result that actual transfers of crude oil would have.

Moreover, it is clear from the legislative history of the EPAA that the Congress intended the President (and the FEA) to have a great deal of flexibility in achieving the goals it established in § 4(b). The Conference Committee Report emphasized that:

> "* * * the President is to retain full authority to require allocation at the producer level on a national, regional, or case-by-case basis whenever he determines it is necessary to attain the objectives of the Act. It is expressly intended to give the President flexibility to act selectively. Accordingly, he may apply controls to large but not small producers—thus avoiding administrative complexity."

2 U.S. Code Cong. & Adm. News, 1973, at 2699.

Marathon's contention that the CEP exceeds the FEA's authority to set prices under the EPAA is also without

merit. The Senate Committee Report on the extension of the EPAA made express reference to the FEA's power to adopt a program removing the inequities in the prices of crude oil.

> "The FEA can, of course, * * * change existing price controls even if the Act is extended for a brief period. The [EPAA] includes authority for such actions. For example, it provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that FEA intends to institute a price equalization program under existing authority in the immediate future." [S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. at 2, Aug. 9, 1974.].

The House report echoes the Senate's with strikingly similar language:

> "Moreover, the [EPAA] includes adequate authority to permit the FEA to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the regional and competitive inequities which result from a dependence upon the high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary." [H. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3 (1974).]

Thus, if the EPAA fails to provide adequate authority to enact the CEP, the Congress was mysteriously unaware of it.

Marathon's contention that the FEA authority to impose this regulation is limited to periods of crude oil scarcity such as accompanied the Arab Oil embargo has been effectively undermined by the decision in *Union Oil Co.* v. *Federal Energy Administration*, No. CV 74-1943-MML (C.D. Cal. 7-25-74). There the court said:

> "In contending that the Emergency Petroleum Allocation Act authorized petroleum allocation only during the period of physical shortages, the plaintiff asks the court to imply a limitation which is not expressed in the Act but is merely to be inferred from some language in the Act. But the Act itself does not have express language dealing with the occasions in which the power to make regulations will end. * * * But Congress had some concern about the structure of the petroleum industry and of the welfare of the independent refiners at times other than the period of shortages brought on by the Arab oil embargo. Certainly the shortages gave impetus to the passage of the Act and provided the occasion for its passage, but the Act is not limited to the problems of physical shortages. Consequently, the Court does not think that the end of the physical shortages spells the demise of the power to allocate petroleum."

Marathon's contentions that the EPAA empowers the the FEA to adopt only one regulation is so plainly frivolous as not to require extended discussion. The short answer is that § 4(g)(1) of the EPAA specifically permits the President to amend the regulation promulgated pursuant to § 4(a) so long as the amended regulation meets the statutory requirements.

It is thus the conclusion of this Court that the CEP is within the statutory authority of the EPAA and may not be enjoined on the ground that it exceeds such authority.

Next plaintiff contends that the CEP is arbitrary, capricious and unsupported by substantial evidence. Here the issue is not whether the Court agrees with the FEA's decision to adopt the CEP or whether the CEP is the best answer possible to the problems identified by the FEA. *See, Pacific Coast Meat Job. Ass'n* v. *Cost of Living Council*, 481 F.2d 1388 (T.E.C.A. 1973). The only issue here is whether the decision of the FEA had a rational basis, given all the facts. Very clearly, the Court's conclusion must be in favor of the FEA. *See, Mandel* v. *Simon*, 493 F.2d 1239 (T.E.C.A. 1974).

To conclude otherwise would be to ignore the mass of evidence adduced by the FEA in this Court. There can be no question that the FEA's selection of refiners as buyers or sellers of entitlements on the basis of their old oil supplies was reasonable and further the various, if conflicting objectives found in § 4(b) of the EPAA.

As has already been found by this Court the two-tier pricing system on crude oil which the FEA maintains in order to minimize the inflationary impact of world-wide oil price increases, while stimulating domestic production, has had an undesirable side effect. Because old oil is price-controlled at approximately $5.25 a barrel, and for no other reason, refiners having more than their proportionate share of the national old oil supply have lower input costs. Refiners having less than their proportionate share have higher input costs since they must rely more heavily on high-priced, uncontrolled, domestic or foreign crude oil that sells, respectively, at approximately $10.00 and $11.25 a barrel. Hence, refiners with greater access to old oil receive a competitive pricing advantage in marketing their products based solely on FEA's two-tier pricing system, an advantage which did not exist prior to the imposition of the two-tier system and which would cease to exist if FEA were immediately to remove its ceiling price on old oil. The mere fact that three major integrated refiners which

have less than their proportionate share of old oil will be entitlement sellers, while a few small refiners will be buyers, does not make the program irrational. Rather, the program merely places the entire petroleum industry in the competitive situation that existed prior to the two-tier pricing system.

This Court will not belabor the point. Marathon's many claims of irrationality seek to entice this Court to take on a role for which it is ill-suited. Many of Marathon's contentions on this point would require this Court very nearly to substitute its judgment for that of the very agency best equipped to deal with this nation's problems with competition among refiners of crude oil. *See, Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (Court may not substitute its judgment for agency's.) Finding an adequate basis in reason for the FEA's regulation, the Court will not enjoin its effectiveness as to Marathon.

It should also be noted that the Court's own Findings of Fact preclude injunctive relief. Marathon failed to show that irreparable harm would surely result if an injunction was not granted. Of course, the necessity of showing irreparable harm when seeking such extraordinary relief is well established and needs no citation of authority.

Lastly, the argument that the CEP was adopted without the proper procedures required by the Administrative Procedure Act is patently without merit. Marathon and every other interested party had more than adequate notice and ample opportunity to make its views known as to the FEA's proposed action. Clearly the Inflationary Impact Statement required by Executive Order No. 11,821, issued November 27, 1974 (39 Fed. Reg. 41501, November 29, 1974), was not a prerequisite to this regulation which was proposed initially on August 28, 1974.

As to Marathon's constitutional challenge, i.e., that the CEP constitutes a taking of property for a private purpose

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without just compensation contrary to the Due Process Clause of the Fifth Amendment, it is clear that this Court is without power to decide the issue. *See*, § 211(c)(2) of the ESA. However, this Court may certify such a question to the Temporary Emergency Court of Appeals if it finds it to be substantial. Such a question is not substantial if it is plainly without merit or if previous Supreme Court decisions appear to foreclose the subject. *See, Delaware Valley Apartment House Owner's Ass'n* v. *United States*, 350 F. Supp. 1144 (E.D. Pa. 1972), *aff'd* 482 F.2d 1400 (T.E.C.A. 1973).

Previous decisions of the Temporary Emergency Court of Appeals appear to indicate that this argument is plainly without merit. *Western States Meat Packers Ass'n* v. *Dunlop*, 482 F.2d 1401 (T.E.C.A. 1973); *Local Union No. 11, IBEW* v. *Boldt*, 481 F.2d 1392 (T.E.C.A. 1973). Hence, this Court finds no substantial constitutional question and declines to certify such to the Temporary Emergency Court of Appeals.

For all of the foregoing reasons, plaintiff's motion for a preliminary injunction is denied. The motion to certify a constitutional question is also denied. The cause is continued for such further proceedings as may be necessary.

IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
United States District Judge

Toledo, Ohio.

January 31, 1975.

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on January 31, 1975.

Mark Schlachet, Clerk

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Regulations Involved

10 C.F.R. § 211.62 contains the following definitions:

* * * * * * * * * * *

"Adjusted crude oil receipts" means the crude oil receipts of a refiner in a particular month the composition of which has been adjusted to reflect any invoice which is received in that month for crude oil (including crude oil sold under § 211.65) delivered to that refiner in any previous month (excluding, however, months prior to November 1974), and which has the effect of increasing or decreasing the volume of old oil received by that refiner in such previous month.

"Adjusted national old oil supply ratio" means, for a particular month, the volume of old oil included in the aggregate adjusted crude oil receipts for all refiners, expressed as a percentage of the sum of (a) the total volume of the crude oil runs to stills for all refiners for that month and (b) thirty percent (30%) of the total volume of eligible imports by eligible firms for that month. Such volume of old oil shall be decreased by a number of barrels of old oil equal to the number of entitlements issuable to small refiners under § 211.67(e).

* * * * * * * * * * *

"Crude oil receipts" means, as to a particular refiner, the volume of crude oil (a) booked into its refineries in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, for its own account or for the account of a firm other than a refiner or (b) if not previously so booked into its refineries, delivered by that refiner for its account to another refiner pursuant to a processing agreement with that other refiner. Crude oil receipts shall not include crude oil received by a refiner for the purpose of processing at its refineries for the account of another refiner. A particular crude oil receipt shall be deemed to have occurred

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when the related cost is booked into refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, whether or not such crude oil has been actually received by that refiner, except that crude oil delivered by one refiner to another refiner pursuant to a processing agreement will be deemed to have been delivered by the delivering refiner to the other refiner when the risk of loss passes to the other refiner under the particular processing agreement or when the crude oil is received at the refinery of the other refiner, whichever occurs first. Crude oil which has been added by a refiner to its inventory and which is thereafter sold or otherwise disposed of without processing for the account of that refiner shall be deducted from its crude oil receipts at the time when the related cost is deducted from refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned. The volume of old oil included in a refiner's crude oil receipts shall be evidenced by and consistent with invoices received with respect to such crude oil receipts.

* * * * * * * * * *

"Eligible firm" means, as to imports of eligible products, a firm (including a refiner) that has received, as to the particular eligible product imported and as to the PAD District in which the import takes place, an import allocation not subject to a license fee under section 12, 28 or 30 of Oil Import Regulation I (revision 5), as amended (32A CFR OI Reg. 1-12, 23 and 30), or a firm which would otherwise qualify for such an import allocation under section 12 or 30 of such Regulation if (a) that firm were in the business in PAD District I of selling the eligible product concerned, (b) that firm had received an allocation of imports of No. 2 heating oil or No. 2-D diesel fuel in the allocation period beginning prior to January 1, 1973, or (iii) that firm were not a refiner and/or a petrochemical producer.

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"Eligible products" means residual fuel oil, No. 2 heating oil and No. 2-D diesel fuel imported into the United States, except that imports into United States customs territory from United States possessions, territories or foreign trade zones shall not be considered eligible products.

"Entitlement" means, for a particular month, the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil receipts in such month. The issuance and transfer of entitlements shall be evidenced on records maintained by the FEA.

* * * * * * * * * *

"New crude petroleum" means new crude petroleum as defined in § 212.72 of this chapter.

"No. 2 heating oil" means heating oil grade No. 2 as defined in American Society for Testing and Materials (ASTM) D396-71.

"No. 2-D diesel fuel" means diesel fuel grade No. 2 as defined in American Society for Testing and Materials (ASTM) D975-71.

"Old oil" means old crude petroleum as defined in § 212.72 of this chapter.

"Old oil supply ratio" means, for a particular month, the number of barrels of old oil included in a refiner's adjusted crude oil receipts, expressed as a percentage of the volume of that refiner's crude oil runs to stills for such month.

* * * * * * * * * *

"Released crude petroleum" means released crude petroleum as defined in § 212.72 of this chapter.

10 C.F.R. § 211.66 Reporting requirements.

* * * * * * * * * *

(h) *Monthly report.* On or prior to the twenty-eighth day of each month, commencing with the month of December 1974, each refiner shall file with the FEA a report certifying the following:

(1) The estimated volume (to the best of the knowledge of the certifying officer of old oil included in the crude oil receipts of that refiner for the immediately preceding month.

(2) Any permitted or required adjustments to the estimated volume of old oil included in the crude oil receipts of that refiner for the immediately preceding month.

(3) The volume of crude oil runs to stills of that refiner for the immediately preceding month, taking into account, and specifying the amount of, the adjustments provided for in § 211.67(d).

(4) Such other information as the FEA may request.

(i) *Monthly transaction report.* On or prior to the tenth day of each month, commencing with the month of February 1975, each refiner and each eligible firm shall file with the FEA a report certifying its purchases and sales of entitlements for the third month prior to the month in which the report is filed, except that if an eligible firm was not issued any entitlements for a month, no filing of a transaction report with respect to that month shall be made.

(j) *Monthly report by eligible firms.* On or prior to the twenty-eighth day of each month, commencing with the month of December 1974, each eligible firm that has imported an eligible product in the immediately preceding month shall file with the FEA a report certifying the following:

(1) The identity, volume and ports of origin and entry of any eligible products imported by that eligible firm in the immediately preceding month.

(2) Such other information as the FEA may request.

(k) *Affidavit for eligible firms.* Each firm that claims to be an eligible firm shall submit to the FEA within twenty-eight (28) days following the first month in which that firm has imported an eligible product as to which the issuance of entitlements is sought an affidavit setting forth the factual basis for its claim to be classified as an eligible firm.

10 C.F.R. § 211.67 (Dec. 4, 1974) provided as follows: Allocation of old oil.

(a) *Issuance of entitlements.* (1) For each month, commencing with the month of November 1974, each refiner shall be issued entitlements by the FEA to include in its adjusted crude oil receipts for that month a specific number of barrels of old oil which will result in an old oil supply ratio for that refiner equal to the adjusted national old oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section.

(2) Refiners to which entitlements shall be issued under this section shall include all refiners classified as refiner-buyers or refiner-sellers as of December 1, 1974 for purposes of § 211.65. Any refiner that is not so classified, or the refinery capacity of which is not certified by the FEA for purposes of § 211.65, shall apply to the FEA for certification of its refinery capacity for purposes of qualifying to receive entitlements under this section. With respect to the granting of any such application for certification, the FEA shall consider the factors set forth in § 211.65(b) (v) and (vi).

(3) For each month, commencing with the month of November 1974, each eligible firm that has imported an eligible product in that month shall be issued a number of entitlements equivalent to thirty percent (30%) of the number of

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entitlements that would be received by a refiner (without giving effect to the provisions of § 211.67(e)) in that month with respect to inclusion of a number of barrels of crude oil in that refiner's crude oil runs to stills equal to the number of barrels of that eligible product imported by that eligible firm. An eligible product is imported for purposes of this paragraph (a)(3) in the month in which the product physically enters the United States.

(b) *Required purchases of entitlements by refiners.* For each month, commencing with the month of November 1974, each refiner that has been issued fewer entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of old oil included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner. Entitlement purchases required under this paragraph (b) with respect to a particular month shall be effected by the close of the second month following that month.

(c) *Refiners and other firms with excess entitlements.* For each month, commencing with the month of November 1974, each refiner that has been issued a greater number of entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall sell such excess entitlements and any eligible firm (other than a refiner) that has been issued entitlements shall sell such entitlements.

(d) *Adjustments to volume of crude oil runs to stills.* (1) A refiner's volume of crude oil runs to stills shall (i) include (A) the volume of crude oil processed by another refiner for that refiner pursuant to a processing agreement and (B) the volume of crude oil processed by that refiner for a person other than a refiner pursuant to a processing agreement, and (ii) exclude the volume of crude oil proc-

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essed by that refiner for another refiner pursuant to a processing agreement.

(2) The volume of a refiner's crude oil runs to stills for purposes of calculating its old oil supply ratio and the adjusted national old oil supply ratio shall be reduced by that refiner's volume of export sales in that month of refined petroleum products (except refined lubricating oils), including sales to a domestic purchaser which certifies the product is for export.

(e) *Entitlement adjustment for small refiners.* In addition to the number of entitlements issuable under paragraph (a) of this section, each small refiner with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month shall be issued additional entitlements for each day of that month equal to the number of barrels obtained by applying the following applicable percentage to the daily average volume of that small refiner's crude oil runs to stills for that month; (i) for daily average volumes of crude oil runs to stills of 100,000 to 175,000 barrels, the applicable percentage is obtained by multiplying the difference between the reported daily average volume of crude oil runs to stills (in thousands of barrels) and 175 by a factor of .0101; (ii) for daily average volumes of crude oil runs to stills of 30,000 to 100,000 barrels, the applicable percentage is obtained by multiplying the difference between the reported daily average volume of crude oil runs to stills (in thousands of barrels) and 100 by a factor of .0214, and by adding .76% to the resulting percentage; (iii) for daily average volumes of crude oil runs to stills of 10,000 to 30,000 barrels, the applicable percentage is obtained by multiplying the difference between the reported daily average volume of crude oil runs to stills (in thousands of barrels) and 30 by a factor of .506, and by adding 2.26 to the resulting percentage; and (iv) for daily average volumes of crude oil

runs to stills of zero to 10,000 barrels, the applicable percentage is 12.38%.

(f) *Transactions under § 211.65.* (1) Each sale by a refiner-seller under § 211.65 shall be deemed to include a volume of old oil proportionate to the volume of old oil included in that refiner-seller's crude oil receipts (in the PAD Districts or District the crude oil deliveries in which determine the price of the sale) in the month in which the sale is made. Any volumes of old oil so included in any sale under § 211.65 shall be included in the crude oil receipts of the refiner-buyer concerned. As to each such sale, each refiner-seller shall certify to the refiner-buyer the volume of old oil included in the volume of crude oil sold within twenty-five (25) days following the month in which the crude oil is delivered to or for the account of the refiner-buyer in accordance with the provisions of § 212.131 of part 212.

(2) In determining the weighted average price of all crude oil delivered to a refiner-seller in a month in the specified PAD District or Districts pursuant to § 212.94 of part 212, the cost of any required purchases or revenues from any sales of entitlements by that refiner-seller shall not be taken into account.

(g) *Exchange of crude oil.* In any exchange of crude oil in which only quality and location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of old oil shall be deemed to have been transferred. Any volumes of old oil delivered pursuant to any such exchange or transaction shall be considered as having been retained by the refiner that has exchanged away or sold such volume, regardless of the volume of crude oil received or purchased by that refiner in such an exchange or transaction.

(h) *Averaging of crude oil receipts.* Upon application by a refiner in accordance with the procedures established under Subpart G of Part 205 of this chapter within twenty (20) days following the close of a month, the FEA may adjust the crude oil receipts of that refiner for that month to permit the portion of such crude oil receipts specified by the FEA to be included in the crude oil receipts of that refiner for one or more subsequent months, if the volume of crude oil receipts in that month is significantly disproportionate to the volume of that refiner's crude oil runs to stills for that month due to shutdowns or other mechanical failures resulting in a fifty percent (50) or greater portion of that refiner's refinery capacity not having been operable for the duration of that month.

(i) *Issuance and transfer of entitlements.* (1) The first month with respect to which entitlements shall be issued is November 1974. The entitlements for the month of November 1974 shall be issued by the FEA on January 10, 1975, pursuant to the notice specified in subparagraph (2) below. As to each month subsequent to November 1974, FEA shall issue entitlements pursuant to a notice published 40 days after the close of that month.

(2) Each notice published by the FEA evidencing the issuance of entitlements under this section shall specify as to a particular month the adjusted national old oil supply ratio, the name of each refiner and other eligible firm to which entitlements have been issued, the number of entitlements issued to each such refiner or other firm, the number of barrels of old oil included in each refiner's adjusted crude oil receipts and the price at which or price range within which entitlements shall be sold.

(3) No transfer of an entitlement shall be effective if made to (i) any person other than a refiner, or (ii) any

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refiner that is not purchasing such entitlement to fulfill such refiner's obligations under paragraph (b) of this section.

(4) The price at which entitlements shall be sold and purchased shall be fixed by the FEA for each month. Such price may be fixed in terms of a price range in which entitlement transactions shall be effected or in terms of a single price at which all entitlement transactions shall take place. Such price or price range shall be fixed by the FEA with reference to the differential between the weighted average prices for old oil and the weighted average prices of new and released crude petroleum, imported crude oil and crude oil produced from stripper wells.

(j) *Failure to consummate transactions.* The FEA may direct refiners that have not purchased the required number of entitlements under paragraph (b) of this section for a particular month to purchase such required number of entitlements at a price specified by the FEA from any refiner or eligible firm that has entitlements for such month available for sale. The FEA may direct refiners or eligible firms that have entitlements available for sale to sell such entitlements at a price specified by the FEA to refiners that have not purchased their required number of entitlements under paragraph (b) of this section.

(k) *Certification of old oil by non-refiners.* Within twenty (20) days following each month commencing with the month of November 1974, each person other than a refiner that has delivered crude oil to a refiner for processing for the account of such person pursuant to a processing agreement in that month shall certify to that refiner the volume of old oil contained in the crude oil so delivered to that refiner.

(l) *Adjustments to product costs.*—(1) *Refiners.* The cost of entitlements purchased in a particular month pursuant to this section by refiners shall be added to the cost

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of crude petroleum purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to product prices in the following month under the "A" factor of the general formulae of § 212.83(c)(2) of this chapter). The sales revenues from entitlements sold in a particular month pursuant to this section by refiners shall be subtracted from the cost of crude petroleum or eligible product purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to product prices in the following month under § 211.83(c) of this chapter) as follows:

(i) The sales revenues from entitlements which are issued for crude oil which are sold in a particular month shall be subtracted from the total cost of crude petroleum purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to all product prices in the following month under the "A," factor of the general formulae of § 212.83(c)(2)).

(ii) The sales revenues from entitlements which are issued for residual fuel oil which are sold in a particular month shall be subtracted from the total cost of residual fuel oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to prices of covered products other than special products under the "Bit" factor of the formula for covered products other than special products of § 212.83(c)(2)(ii)).

(iii) The sales revenues from entitlements which are issued for No. 2 heating oil or No. 2-D diesel fuel which are sold in a particular month shall be subtracted from the total cost of No. 2 heating oil or No. 2-D diesel fuel purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating

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the increased costs to be applied to prices for special products where (i=1) under the "Bit" factor of the general formula of § 212.83(c)(2)(i) for special products where (i=1)).

(2) *Resellers and Retailers.* The sales revenues from entitlements sold pursuant to this section by resellers or retailers shall be subtracted from the cost of the product in inventory for which the entitlements were issued, so as to reduce the weighted average unit cost of that product in inventory computed pursuant to § 212.92 of this chapter.

(3) *Use of eligible products entitlements by refiners to which they are issued.* A refiner that is issued entitlements with respect to eligible products shall account for the use of those entitlements to include old oil in its crude oil receipts as if it had purchased such entitlements so as to incur an increased cost of crude oil pursuant to subparagraph (1) above and as if it had sold such entitlements so as to reduce its cost of the eligible product for which the entitlements were issued, pursuant to subparagraphs (1)(ii) and (1)(iii) of this paragraph.

(4) *Timing.* The date of purchase or sale of entitlements for purposes of determining the date on which a cost or a cost reduction is incurred under § 212.83(c) or § 212.93 of this chapter shall be the date on which the transaction is reported to have taken place on the monthly transaction report filed with the FEA under paragraph (i) of § 211.66.

Directive of January 10, 1975

Allocation of Old Oil; Entitlement Notice

Pursuant to the authority of the Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, the Federal Energy Administration has established the Old Oil Entitlements Program, and in accordance with the provisions of 10 CFR 211.67, the notice specified in § 211.67(i) is hereby published.

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Based on reports submitted to FEA by refiners and eligible firms as to crude oil receipts, crude oil runs to stills and eligible product imports for November 1974 and an application of the entitlement adjustment for small refiners provided in 10 CFR 211.67(e), the adjusted national old oil supply ratio for November 1974 is calculated to be .4105.

The issuance of entitlements for the month of November 1974 to refiners and eligible firms is set forth as an Appendix to this notice. The Appendix lists the name of each refiner and other eligible firm to which entitlements have been issued, the number of entitlements issued to each such refiner or other firm, and the number of barrels of old oil included in each refiner's adjusted crude oil receipts.

Pursuant to 10 CFR 211.67(i)(4) and as fixed by FEA notice (39 FR 43103, December 10, 1974), the price at which entitlements issued for the month of November 1974 shall be sold and purchased will be $5. In accordance with 10 CFR 211.67(b), each refiner that has been issued fewer entitlements for the month of November 1974 than the number of barrels of old oil included in its adjusted crude oil receipts is required to purchase a number of entitlements for the month of November 1974 equal to the difference between the number of barrels of old oil included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner. Refiners which have been issued a number of entitlements for the month of November 1974 in excess of the number of barrels of old oil included in the adjusted crude oil receipts for November 1974, and eligible firms which have been issued entitlements for November 1974, shall sell such excess entitlements to refiners required to purchase entitlements.

The listing of entitlement issuances contained in the Appendix reflects the application of Special Rule No. 3 (39 FR 43814, December 19, 1974) which operates to relieve certain small refiners from the requirement to purchase entitlements for the first 30,000 barrels per day of their daily

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average volume of crude oil runs to stills for the month of November 1974. Accordingly, for those small refiners whose purchase requirements were totally exempted pursuant to Special Rule No. 3, the Appendix specifies issuance of an incremental number of entitlements equal to the number such refiners would have otherwise been required to purchase. The total number of entitlements so exempted from the purchase requirements of 10 CFR 211.67(b) is 4,187,997. A factor of .7675 has been applied to the number of entitlements available for sale by each refiner and eligible firm, which has the effect of reducing the total number of entitlements available for sale by an amount equal to the total purchase requirements exempted pursuant to Special Rule No. 3.

Refiners which have reported no volumes of old oil receipts and crude oil runs to stills for November 1974, and eligible firms which have filed reports indicating no eligible product imports for this month have not been included in the listing contained in the Appendix.

The total volume of entitlements required to be purchased and sold under this notice is 13,825,979.

Entitlement purchases required under 10 CFR 211.67(b) for the month of November must be effected by January 31, 1975. On or prior to February 10, 1975, each refiner and eligible firm which has been issued entitlements for November shall file with FEA the monthly transaction report specified in 10 CFR 211.68(i) certifying its purchases and sales of entitlements for the month of November. FEA will mail monthly transaction report forms for November 1974 to reporting firms in January 1975. Refiners and eligible firms which have been unable to locate firms for required entitlement transactions by January 25, 1975 may contact FEA at 202-634-7610 to obtain assistance in locating a firm with outstanding purchase or sale requirements. For refiners and eligible firms that have failed to consummate entitlement

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transactions on or prior to January 31, 1975, FEA may direct sales and purchases of entitlements pursuant to the provisions of 10 CFR 211.67(j).

Issued in Washington, D.C., January 10, 1975.

ROBERT E. MONTGOMERY, JR.,
General Counsel,
Federal Energy Administration.

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Appendix
Entitlements for Allocation of Old Oil

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Allied Materials Company	85,285	85,285	0	0
Amerada Hess	4,026,856	6,683,369	0	2,656,513
American Petrofina	2,365,476	2,149,379	216,097	0
Amoco Oil	13,039,123	11,670,710	1,368,413	0
APCO Oil Corporation	366,947	482,768	0	115,821
Arizona Fuels Corporation	44,085	44,085	0	0
Ashland	2,538,982	2,914,328	0	375,346
Atlantic Richfield	5,443,210	6,381,891	0	938,681
Axel Johnson	58,444	204,103	0	145,659
Bay/Dow	22,673	168,328	0	145,655
Bayou State Oil Corporation	46,596	49,987	0	3,391
Beacon Oil Company	301,797	307,797	0	0
Belcher Oil Company	—	118,388	0	118,388

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Blue Ridge Fuel Company	—	23,102	0	23,102
C & H Refining	7,134	7,134	0	0
Calumet Industries	0	23,123	0	23,123
Canal Refining Company	66,260	66,260	0	0
Caribou Four Corners	104,152	104,152	0	0
Castle Coal and Oil Company	—	45,962	0	45,962
Central Petroleum Corp.	—	8,507	0	8,507
Champlin Petroleum	1,814,485	1,752,104	62,381	0
Charter Oil Company	1,062,993	1,051,586	11,407	0
Cirillo Brothers Oil Co.	—	165,171	0	165,171
Cities Service	3,929,417	3,230,328	690,089	0
Claiborne Gas Company	63,732	63,732	0	0
Clark Oil & Refining	339,991	761,099	0	421,108

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Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Coastal States Gas	1,883,227	1,893,812	0	10,585
Colonial Oil Industries	—	32,860	0	32,860
Commonwealth Oil Refining	603,057	926,773	0	323,716
Consumers Power	—	49,590	0	49,500
Continental Oil	4,430,012	3,809,189	620,823	0
CRA—Farmland Industries, Inc.	662,569	658,585	3,984	0
Cross Oil & Refining	8,405	40,932	0	32,527
Crown Central	1,234,627	1,100,388	134,239	0
Crystal Oil Company (LA)	216,505	239,317	0	22,812
Crystal Refining Company	27,741	37,596	0	9,855
Deepwater Oil Terminals	—	11,553	0	11,553
Delta Refining Company	753,051	735,289	17,762	0
Diamond Shamrock	645,601	663,690	0	18,089

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Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Dingman Oil & Refining	15,277	16,411	0	1,134
Dorchester Gas	3,553	6,140	0	2,587
Eastern Seabord Petroleum Company	—	92,112	0	92,112
Eddy Refining Company	67,759	67,759	0	0
Edgington Oil Company	485,280	485,280	0	0
Edgington Oxnard Ref.	24,404	24,620	0	216
Elm City Filling Stations	—	52,105	0	52,105
Evangeline Refining Company, Inc.	31,977	31,977	0	0
Exxon	15,896,672	14,497,311	1,399,361	0
Famariss Oil Corporation	484,001	484,001	0	0
Farmers Union Central Exchange, Inc.	274,132	380,228	0	106,096
F. O. Fletcher, Inc.	—	754	0	754
Fletcher Oil & Refining	204,877	241,753	0	36,876

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Flint Chemical Corporation	10,680	11,064	0	384
Gary Operating Company	40,634	63,530	0	22,896
Getty/Skelly	1,313,831	1,702,997	0	389,166
Giant Industries	2,698	5,134	0	2,436
Gibbs Oil Company	—	14,402	0	14,402
Gladieux Refinery	58,694	58,694	0	0
Golden Eagle Refining Co.	174,508	205,838	0	31,330
Good Hope Refineries	412,551	412,551	0	0
Great Northern Paper Co.	—	12,527	0	12,527
Guam Oil & Refining	0	191,292	0	191,292
Gulf Oil Corp.	11,304,079	10,528,386	775,693	0
Gulf States Oil & Refining	2,705	2,705	0	0
Hawaiian Independent Refinery, Inc.	0	393,399	0	393,399

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Howard Oil Company	—	124,470	0	124,470
Howell Corporation	809,489	794,502	14,987	0
Hunt Oil Company	238,525	249,222	0	10,697
Husky Oil Company	715,701	680,395	35,306	0
Indiana Farm Bureau Cooperative Assn.	125,103	187,831	0	62,728
J & W Refining, Inc.	223,754	227,757	0	4,003
Kentucky Oil Refining Co.	1,371	4,863	0	3,492
Kerr-McGee Corporation	2,603,442	2,074,704	528,738	0
Koch Refining Company	699,972	760,523	0	60,551
LaGloria Oil & Gas Company	486,472	486,472	0	0
Lakeside Refining Company	12,380	35,050	0	22,670
Laketon Asphalt Refining, Inc.	209,477	209,477	0	0
Little America Refining Co.	470,160	470,160	0	0

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Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
MacMillan Refining Oil Co.	130,884	170,221	0	39,337
Marathon Oil Company	4,112,832	3,391,210	721,622	0
Marion Corporation	105,576	201,259	0	95,683
Metropolitan Petroleum Co.	—	85,049	0	85,049
Mid-America Refinery Company, Inc.	0	29,473	0	29,473
Midland Coop, Inc.	268,931	268,931	0	0
Mobil Oil Corporation	8,881,437	10,104,089	0	1,222,652
Mohawk Petroleum Corporation	605,051	605,051	0	0
Monsanto Company	514,840	523,490	0	8,650
Morrison Petroleum Company	13,813	13,813	0	0
Mountaineer Refinery Co., Inc.	6,039	6,039	0	0
Murphy Oil Corporation	1,574,829	1,366,553	208,276	0
National Co-op Refinery Association	662,377	651,567	10,810	0

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
National Oil Recovery Corp.	10,200	10,200	0	0
Navajo Refining Company	426,443	426,443	0	0
New England Petroleum Corp.	—	534,407	0	534,407
Newhall Refining Company	209,508	209,508	0	0
R. B. Newman Fuel Corp.	—	7,533	0	7,533
North American Petroleum Corporation	144,386	144,386	0	0
Northeast Petroleum Industries	—	96,015	0	96,015
Northville Industries, Inc.	—	62,452	0	62,452
Oil Shale Corporation	974,251	949,462	24,789	0
OKC Refinery, Inc.	377,752	377,752	0	0
Oriental Refining Company	36,875	41,484	0	4,609
Pacific Gas & Electric Co.	—	49,196	0	49,196
Pasco, Inc.	759,387	759,387	0	0

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Patchogue Oil Terminal Corporation	—	18,123	0	18,123
Pennzoil Company	661,802	658,968	2,834	0
Petroleum Heat & Power (Stanford, CT)	—	44,637	0	44,637
Petroleum Heat & Power (Philadelphia, PA)	—	27,988	0	27,988
Phillips Petroleum Company	5,138,861	4,693,491	445,370	0
Pioneer Refining Company	18,009	18,009	0	0
Plateau, Inc.	11,141	49,367	0	38,226
Powerline Oil Company	547,254	540,603	6,651	0
Pride Refining, Inc.	357,284	367,367	0	10,083
Quaker State Oil Refining Corporation	23,816	212,405	0	188,589
Rock Island Refining Corp.	475,127	474,738	389	0
Royal Petroleum Corp.	—	12,208	0	12,208
Sage Creek	4,748	5,822	0	1,074

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
San Joaquin Refining Company	226,300	226,300	0	0
Seminole Asphalt Refining Company	0	39,979	0	39,979
Shell Oil Company	14,962,472	11,984,751	2,977,721	0
Socal/Chevron	8,164,000	10,189,243	0	2,025,243
Sohio (Standard Oil Company of Ohio)	3,694,100	3,248,038	446,062	0
Somerset Refinery Company	0	34,177	0	34,177
Sound Refining, Inc.	69,128	69,128	0	0
South Hampton Company	73,559	80,899	0	7,340
Southland Oil Company	375,615	375,615	0	0
Southwestern Refining Co.	610	610	0	0
Steuart Petroleum Company	—	75,774	0	75,774
Sun Oil Company	5,947,592	5,026,750	920,842	0
Sunland Refining Company	104,065	113,497	0	9,432

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Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Swann Oil Company	—	35,640	0	35,640
Terricone, Inc.	—	24,672	0	24,672
Tauber Oil Company	—	13,016	0	13,016
Tenneco Oil Company	1,511,673	1,443,920	67,753	0
Tesoro Petroleum Corp.	1,085,766	934,663	151,103	0
Texaco, Inc.	12,709,014	13,330,038	0	621,024
Texas Asphalt & Refining Company	1,035	13,029	0	11,994
Texas City Refining, Inc.	1,030,991	908,239	122,752	0
Thagard Oil	41,498	41,498	0	0
The Refinery Corporation	146,156	205,647	0	59,401
Thriftway Oil Company	5,594	17,721	0	12,127
Thunderbird Resources, Inc.	161,479	194,756	0	33,277
Tonkawa Refining Company	9,492	38,150	0	28,658

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Toro Petroleum Corporation	379,332	424,870	0	45,538
Total Leonard, Inc.	152,282	455,839	0	303,557
Union Oil of California	6,920,012	5,089,287	1,830,725	0
Union Texas Petroleum	136,717	136,717	0	0
United Refining Company	340,589	542,662	0	202,073
U. S. Oil Refining	53,908	169,063	0	115,155
Ven Fuel	—	14,820	0	14,820
Vickers Petroleum Corporation	413,828	431,685	0	17,857
Vulcan Asphalt Refining Company	0	11,681	0	11,681
Waller Petroleum Company	—	10,398	0	10,398
Warrior Asphalt Corporation	72,382	72,382	0	0
Wellen Oil, Inc.	—	23,561	0	23,561
West Coast Oil Company	506,449	506,449	0	0

Name of Refiners and Eligible Firms	Old Oil Receipts (bbls)	Number of Entitlements Issued	Number of Entitlements to be Purchased	Number of Entitlements to be Sold
Western Refining Company	5,511	11,288	0	5,777
Winston Refining Company	279,255	279,255	0	0
Wireback Oil Company	1,764	1,764	0	0
Witco Chemical Corporation	136,112	177,294	0	41,182
Wyatt, Inc.	—	89,597	0	89,597
Yetter Oil Company	0	618	0	618
Young	55,357	55,357	0	0
TOTAL	170,423,681	170,423,681	13,825,979	13,825,979

10 C.F.R. § 211.67, as amended by 39 Fed. Reg. 44710, 40 Fed. Reg. 6768, 10445, 13303, 14738, 28447, 40818, provides as follows:

Allocation of Old Oil

(a) *Issuance of entitlements.*

(1) For each month, commencing with the month of November 1974, each refiner shall be issued entitlements by the FEA to include in its adjusted crude oil receipts for that month a specific number of barrels of old oil which will result in an old oil supply ratio for that refiner equal to the adjusted national old oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section.

(2) Refiners to which entitlements shall be issued under this section shall include all refiners classified as refiner-buyers or refiner-sellers as of December 1, 1974 for purposes of § 211.65. Any refiner that is not so classified, or the refinery capacity of which is not certified by the FEA for purposes of § 211.65, shall apply to the FEA for certification of its refinery capacity for purposes of qualifying to receive entitlements under this section. With respect to the granting of any such application for certification, the FEA shall consider the factors set forth in § 211.65(b)(v) and (vi).

(b) *Required purchases of entitlements by refiners.* For each month, commencing with the month of November 1974, each refiner that has been issued fewer entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of old oil included in that refiner's adjusted crude oil receipts for that month and the number of

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entitlements issued to and retained by that refiner. Entitlement purchases required under this paragraph (b) with respect to a particular month shall be effected by the close of the second month following that month.

(c) *Refiners and other firms with excess entitlements.* For each month, commencing with the month of November 1974, each refiner that has been issued a greater number of entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall sell such excess entitlements and any eligible firm (other than a refiner) that has been issued entitlements shall sell such entitlements.

(d) *Adjustments to volume of crude oil runs to stills.*

(1) A refiner's volume of crude oil runs to stills shall (i) include (A) the volume of crude oil processed by another refiner for that refiner pursuant to a processing agreement and (B) the volume of crude oil processed by that refiner for a person other than a refiner pursuant to a processing agreement, and (ii) exclude the volume of crude oil processed by that refiner for another refiner pursuant to a processing agreement.

(2) The volume of a refiner's crude oil runs to stills for purposes of calculating its old oil supply ratio and the adjusted national old oil supply ratio shall be reduced by that refiner's volume of export sales in that month of refined petroleum products (except refined lubricating oils), including sales to a domestic purchaser which certifies the product is for export.

(3) The volume of a refiner's crude oil runs to stills in a particular month for purposes of calculating its old oil supply ratio and the adjusted national old oil

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supply ratio shall include the total number of barrels of plant condensate and the total number of barrels of synthetic crude oil made from tar sands which are imported from Canada and are utilized in that month as inputs to distillation units by a refiner, measured in accordance with the Bureau of Mines Form 6-1300-M. Neither plant condensate nor synthetic crude oil made from tar sands which are imported from Canada shall be eligible for inclusion in the volume of a refiner's crude oil runs to stills under this subparagraph (3) unless payment has been made in accordance with Presidential Proclamation No. 3279 of any import license fees applicable to crude oil as defined for purposes of this section, which is imported for refining.

(e) *Entitlement adjustment for small refiners.* In addition to the number of entitlements issuable under paragraph (a) of this section, each small refiner with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month shall be issued the following number of additional entitlements for each day of that month: (1) for each small refiner with a daily average volume of crude oil runs to stills of 100,000 to 175,000 barrels, 1,258 entitlements less the number of entitlements obtained by multiplying the difference between that small refiner's daily average volume of crude oil runs to stills (in thousands of barrels) and 100 by 16.7733; (2) for each small refiner with a daily average volume of crude oil runs to stills of 30,000 to 100,000 barrels, 1,690 entitlements less the number of entitlements obtained by multiplying the difference between that small refiner's daily average volume of crude oil runs to stills (in thousands of barrels) and 30 by 6.1714; (3) for each small refiner with a daily average volume of crude oil runs to stills of 10,000 to 30,000 barrels, 1,238 entitlements plus the number of entitlements obtained by multiplying the difference between that small refiner's

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daily average volume of crude oil runs to stills (in thousands of barrels) and 10 by 22.6; and (4) for each small refiner with a daily average volume of crude oil runs to stills of zero to 10,000 barrels, 123.8 entitlements for each 1,000 barrels of that small refiner's daily average volume of crude oil runs to stills.

(f) *Transactions under § 211.65.* (1) Each sale by a refiner-seller under § 211.65 shall be deemed to include a volume of old oil proportionate to the volume of old oil included in the deliveries of crude oil to that refiner-seller that determine the price at which the sale is made under § 212.94 of part 212. Any volumes of old oil so included in any sale under § 211.65 shall be reflected in the crude oil receipts of the refiner-buyer concerned. As to each such sale, each refiner-seller shall certify to the refiner-buyer the volume of old oil included in the volume of crude oil sold within twenty-five (25) days following the month in which the crude oil is delivered to or for the account of the refiner-buyer in accordance with the provisions of § 212.131 of part 212.

(2) In determining the weighted average price of all crude oil delivered to a refiner-seller in a month in the specified PAD District or Districts pursuant to § 212.94 of part 212, the cost of any required purchases or revenues from any sales of entitlements by that refiner-seller shall not be taken into account.

(g) *Exchanges of crude oil.* In any exchange of crude oil in which only quality and location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of old oil shall be deemed to have been transferred. Any volumes of old oil delivered pursuant to any such exchange or transaction shall be considered as having been retained by the refiner that has ex-

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changed away or sold such volume, regardless of the volume of crude oil received or purchased by that refiner in such an exchange or transaction.

(h) *Averaging of crude oil receipts.* Upon application by a refiner in accordance with the procedures established under Subpart G of Part 205 of this chapter within twenty (20) days following the close of a month, the FEA may adjust the crude oil receipts of that refiner for that month to permit the portion of such crude oil receipts specified by the FEA to be included in the crude oil receipts of that refiner for one or more subsequent months, if the volume of crude oil receipts in that month is significantly disproportionate to the volume of that refiner's crude oil runs to stills for that month due to shutdowns or other mechanical failures resulting in a fifty percent (50%) or greater portion of that refiner's refinery capacity not having been operable for the duration of that month.

(i) *Issuance and transfer of entitlements.* (1) The first month with respect to which entitlements shall be issued is November 1974. The entitlements for the month of November 1974 shall be issued by the FEA on January 10, 1975, pursuant to the notice specified in subparagraph (2) below. As to each month subsequent to November 1974, FEA shall issue entitlements pursuant to a notice published 40 days after the close of that month.

(2) Each notice published by the FEA evidencing the issuance of entitlements under this section shall specify as to a particular month the adjusted national old oil supply ratio, the name of each refiner and other eligible firm to which entitlements have been issued, the number of entitlements issued to each such refiner or other firm, the number of barrels of old oil included in each refiner's adjusted crude oil receipts and the

price at which or price range within which entitlements shall be sold.

(3) No transfer of an entitlement shall be effective if made to (i) any person other than a refiner, or (ii) any refiner that is not purchasing such entitlement to fulfill such refiner's obligations under paragraph (b) of this section.

(4) The price at which entitlements shall be sold and purchased shall be fixed by the FEA for each month. Such price may be fixed in terms of a price range in which entitlement transactions shall be effected or in terms of a single price at which all entitlement transactions shall take place. Such price or price range shall be fixed by the FEA with reference to the differential between the weighted average costs to refiners of old oil and of new and released crude petroleum, imported crude oil and crude oil produced from stripper well leases.

(5) Refiners and eligible firms shall correct any errors contained in reports filed pursuant to paragraphs (h) and (j) of § 211.66 by filing an amended report for the particular month. Based on any reporting errors so corrected, FEA in its discretion may adjust entitlement issuances to the refiner or eligible firm in a month or months subsequent to the month in which the amended report is filed with the FEA, by issuing fewer entitlements than the number otherwise issuable or by requiring the refiner or eligible firm to purchase entitlements in order to correct for excess entitlements issued in a prior month or by issuing entitlements over and above the number otherwise issuable to compensate for too few entitlements having been issued in such prior month. Amended reports setting forth corrections which would result in adjustments favorable to a refiner or eligible firm shall be filed no later than the 28th day of the second month following the month

in which the report being corrected is required to be filed. Refiners and eligible firms which seek corrections in their favor subsequent to the two month period allowed for filing amended reports may apply to FEA for an exception from the provisions of this subparagraph in accordance with the procedures established in subpart D of part 205 of this chapter. All entitlement issuances or purchase requirements shall give effect to any differential between the entitlement price for the month in which any correction is reflected as compared with the entitlement price for the month as to which the reporting error was made and such other factors as the FEA deems appropriate.

(6) Notwithstanding the provisions of paragraph (i) of § 211.66, eligible firms which failed to report any volumes of eligible products imported for the month of November or December, 1974 and which were otherwise eligible to receive entitlements in accordance with the provisions of this subpart in effect with respect to those months may report those volumes of eligible products on or before February 28, 1975. Any volumes so reported to the FEA shall be reflected, to the extent determined by FEA after consideration of such factors as it deems appropriate, in the entitlement issuances to those eligible firms either for the month of December 1974 (if the amended report reflecting the correction has been filed with the FEA by February 3, 1975) or for January 1975.

(j) *Failure to consummate transactions.* The FEA may direct refiners that have not purchased the required number of entitlements under paragraph (b) of this section for a particular month to purchase such required number of entitlements at a price specified by the FEA from any refiner or eligible firm that has entitlements for such month available for sale. The FEA may direct refiners or eligible firms that have

entitlements available for sale to sell such entitlements at a price specified by the FEA to refiners that have not purchased their required number of entitlements under paragraph (b) of this section.

(k) *Certification of old oil by non-refiners.* Within twenty (20) days following each month, commencing with the month of November 1974, each person other than a refiner that has delivered crude oil to a refiner for processing for the account of such person pursuant to a processing agreement in that month shall certify to that refiner the volume of old oil contained in the crude oil so delivered to that refiner.

(l) *Adjustments to Crude Oil Costs.* (1) *Computations.* (i) *Entitlements purchased.* The cost of entitlements purchased in a particular month pursuant to this section by refiners shall be added to the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased cost to be applied to product prices in the following month under the "A '" factor of the general formulae of § 212.82(c)(2) of this chapter); *provided, that,* to the extent that the obligation of a refiner to purchase entitlements is reduced by volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement, and that the monetary value of that reduced purchase obligation is used to reduce the processing fee otherwise payable by that firm under the processing agreement, or is otherwise passed on to that firm, such monetary value may also be added by that refiner to its cost of crude petroleum purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the monetary value of the reduced purchase obligation is passed on pursuant to this paragraph.

(ii) *Entitlements sold.* The sales revenues from entitlements sold in a particular month pursuant to this section by refiners shall be subtracted from the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to all product prices in the following month under the "A'" factor of the general formulae of § 212.83(c)(2) of this chapter); *provided, that,* to the extent that the sales revenues from entitlements which are issued for volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement are used to reduce the processing fee otherwise payable by that firm under the processing agreement, or are otherwise passed on to that firm, such sales revenues shall not be subtracted by that refiner from its cost of crude petroleum purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the entitlement sales revenues are passed on pursuant to this paragraph.

(2) *Timing.* The date of purchase or sale of entitlements for purposes of determining the date on which a cost or a cost reduction is incurred under § 212.83(c) of this chapter shall be the date on which the transaction is reported to have taken place on the monthly transaction report filed with the FEA under paragraph (i) of § 211.66.

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COMPANION CASES

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. DC-34

CITIES SERVICE COMPANY AND CITIES SERVICE OIL COMPANY,
Plaintiffs-Appellants,

GULF OIL CORPORATION, EXXON CORPORATION, MARATHON OIL COMPANY AND HUNT OIL COMPANY, *Amici Curiae,*

v.

FEDERAL ENERGY ADMINISTRATION AND FRANK G. ZARB,
Defendants-Appellees,

and

ASHLAND OIL, INC., *Amicus Curiae.*

(FILED DECEMBER 31, 1975)

Appeal from the United States District Court
for the District of Columbia

(Civ. 75-0653)

Before CHRISTENSEN, ESTES, and JOHNSON, *Judges.*
ESTES, *Judge.*

This suit was commenced in the United States District Court for the District of Columbia by Cities Service Company and its wholly-owned subsidiary Cities Service Oil Company (Cities Service), plaintiffs-appellants, to obtain injunctive relief from all or part of their purchase obligations under the Old Oil Entitlements Program,[1] 10 CFR

[1] Cities Service sought to enjoin the imposition or enforcement of any entitlement purchase obligations based on its refining more old oil than the national average or, in the alternative, to enjoin the imposition or enforcement of any entitlement purchase obligations based on its refining its own old oil production.

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§ 211.67 (Entitlements Program), 39 FR 42,246 (Dec. 4, 1974), and a declaratory judgment that the actions of the Federal Energy Administration,[2] et al. (FEA), defendants-appellees, in promulgating the Entitlements Program were unlawful on the grounds that such actions were: in excess of the agency's statutory authority; arbitrary, capricious, and an abuse of discretion; not in accordance with the governing statute; and an unconstitutional burden on the plaintiffs.[3]

Cities Service based these contentions on its allegations that the program fails to physically allocate any crude oil or set the prices for such oil; that Cities Service is unable to pass through its increased costs under the program on a dollar-for-dollar basis as mandated by section 4(b)(2)(A) of the Emergency Petroleum Allocation Act

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[2] Congress established the Federal Energy Administration under the Federal Energy Administration Act of 1974, 88 Stat. 97, 15 U.S.C. § 761 (1975 Supp.), "to assure a coordinated and effective approach to overcoming energy shortages. . . ." 15 U.S.C. § 761(b).

[3] Pursuant to 10 CFR § 205 Subpart D, Cities Service filed an application with the Office of Exceptions and Appeals of the FEA for exception relief from the Entitlements program for purchase obligations arising out of the crude oil runs to stills made by Cities Service in November. *Cities Service Company*, Case No. FEE 1443 (filed 2-7-75, decided 2-20-75), 3 CCH Energy Management ¶ 83,043. Subsequently, Cities Service filed an application for complete exception relief from the Entitlements program for the duration of the regulations' existence. *Cities Service Company*, Case No. FEE 1459 (filed 2-13-75, decided 3-27-75), 3 CCH Energy Management ¶ 83,100. Both applications for relief were denied by the FEA. Under 10 CFR § 205.58 and § 205.100(b), a party aggrieved by an order issued by the FEA under, *inter alia*, 10 CFR § 205 subpart D, has not exhausted its administrative remedies until an appeal has been filed pursuant to 10 CFR § 205, subpart H, and an order granting or denying the appeal has been issued. Cities Service filed an appeal from the February 20, 1975 decision of the FEA, which was also denied. *Cities Service Company*, Case No. FEA 0385 (filed 3-24-75, decided 4-8-75), 3 CCH Energy Management ¶ 80,568.

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of 1973, 87 Stat. 628, as amended, 15 U.S.C. § 753(b)(2)(A) (1975 Supp.); that the classification of buyers and sellers under the program lacks a rational basis; the program causes further market distortions; that the small refiner bias is arbitrary and capricious; that under the program Cities Service is required to make cash payments to its refiner-competitors which is not mandated by the Allocation Act and constitutes an unconstitutional taking of property for private purposes without just compensation prohibited by the Fifth Amendment, and that the program is an unconstitutional tax prohibited by Article I, Sec. 8, cl. 1 of the Constitution.

On July 10, 1975, the district court consolidated the hearing on plaintiffs' motion for a preliminary injunction with a plenary hearing on the merits; denied the plaintiffs injunctive relief; refused to certify plaintiffs' constitutional claims, finding them insubstantial and without merit;[4] and entered judgment for the defendants. *Cities Service Company, et al.* v. *F.E.A., et al.* (D.D.C. CA No. 75-653, July 10, 1975), 3 CCH Energy Management ¶ 26,024. Most of plaintiffs' contentions were rejected by the district court for the reasons three district courts had held that FEA's Entitlements program was authorized by the governing statute and the constitutional questions presented were without merit. *Exxon Oil Company* v. *F.E.A.*

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[4] Under section 211(c) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended (Stabilization Act), 12 USC § 1904 note (1975 Supp.), as incorporated into the Allocation Act by section 5(a)(1) thereof, 15 USC § 754(a)(1) (1975 Supp.), in any action where the district court determines that a substantial constitutional issue exists, the court must certify such issue for resolution by the Temporary Emergency Court of Appeals. As the district court stated, citing *Delaware Valley Apartment House Owners' Ass'n* v. *U.S.*, 350 F.Supp. 1144 (E.D.Pa. 1972), *aff'd*, 482 F.2d 1400 (TECA 1973): "[s]uch [constitutional] questions are not substantial if they are plainly without merit or if previous Supreme Court decisions appear to foreclose the subject." 3 CCH Energy Management ¶ 26,024 at p. 26,224.

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(D.N.J. CA No. 75-150, Jan. 30, 1975), dismissed for lack of jurisdiction, 516 F.2d 1397 (TECA, 1975), 3 CCH Energy Management ¶ 26,019; *Marathon Oil Co.* v. *F.E.A.* (N.D. Ohio CA No. 75-36, Jan. 31, 1975), 3 CCH Energy Management ¶ 26,015, dismissed for lack of jurisdiction, 516 F.2d 1397 (TECA, 1975), 3 CCH Energy Management ¶ 26,019; *Gulf Oil Corporation* v. *F.E.A.*, 391 F.Supp. 856 (W.D.Pa. 1975), 3 CCH Energy Management ¶ 26,014, dismissed for lack of jurisdiction, —— F.2d —— (TECA Slip Opinion No. 3-6, June 20, 1975). Notice of appeal was filed in this court by Cities Service on July 18, 1975.

Exxon, Marathon, and Gulf, respectively, have filed briefs in support of Cities Service's position.

Cities Service is an integrated petroleum company engaged in producing, transporting, refining, purchasing, and selling crude oil and petroleum products. A high proportion of the crude oil Cities Service refines is its own "old" oil production, i.e., crude oil the price of which is controlled by the FEA at approximately $5.25 under the two-tier price system, 10 CFR § 212.73.[5] The two-tier price system was upheld by this court in a comprehensive opinion discussing the validity and effects of the system in *Consumers Union* v. *Sawhill*, —— F.2d ——, rehearing *en banc* (Slip Opinion No. DC-26, July 7, 1975), 3 CCH Energy Management ¶ 26,011, vacating 512 F.2d 1112 (TECA, 1975).

The two-tier price system effectively minimized the inflationary impact of rising world-wide oil prices and provided necessary incentives for increased domestic produc-

[5] The Cost of Living Council originated the "two-tier" pricing system for crude oil as a part of Phase IV of the Stabilization Program. 6 C.F.R. § 150, Subpart L, 38 F.R. 22,536 (Aug. 22, 1973). These rules were subsequently adopted by the Federal Energy Office as 10 CFR § 212, Subpart D, 39 F.R. 1924 (Jan. 15, 1974). The Federal Energy Office became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 97, 15 U.S.C. § 761 (1975 Supp.).

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tion. However, with the end of the Arab oil embargo and emergence of adequate crude oil supplies, the in-put cost of crude oil to refiners assumed crucial significance. Consumers could buy gasoline from stations with the lowest prices, rather than from stations with the shortest waiting lines. Thus, the great disparity between the price of controlled and uncontrolled crude oil was having an unequal impact on all refiners [6] and, contrary to other objectives of the Allocation Act, contained in sections 4(b)(1)(A)-(I), economic distortions, interference with the competitive viability of the small and independent sectors of the petroleum industry, and inequitable prices to consumers developed in certain areas of the country under the two-tier system due to the varying reliance of the geographic region in which they made gasoline and petroleum product purchases on uncontrolled domestic and imported oil.

Seeking to remedy this situation without losing the beneficial aspects of the two-tier price system, the FEA promulgated the Entitlements Program.[7] The basic purpose

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[6] As this court stated in *Pasco, Inc.* v. *F.E.A.*, —— F.2d —— (TECA Slip Opinion No. 10-7, Oct. 14, 1975), 3 CCH Energy Management ¶ 26,031 at p. 26,252, "During the base period of May, 1973, composite crude oil costs of all refiners were approximately equal; however, with the pricing system in effect, the major integrated oil companies, who as a class had far greater access to old oil, had significantly lower composite crude oil costs in refining their products than did the small and independent refiners." Prior to the advent of the two-tier price system, Cities Service had higher weighted average crude oil costs than the weighted average cost for all major refiners; however, the circumstances necessitating implementation of the two-tier system and passage of the Allocation Act resulted in the composite crude oil costs of Cities Service falling below that of other majors and the small and independent refiners.

[7] The Entitlements Program originated in a notice of proposed rulemaking issued by the FEA on August 28, 1974, 39 F.R. 31,650 (Aug. 30, 1974), following which public hearings were held and over 600 comments were received by the FEA. A second notice of

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of the Entitlements Program was to spread the benefit of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products,[8] while retaining the incentives for increased production and anti-inflationary measures which the two-tier price system provided.

The Entitlements Program essentially requires petroleum refiners to shift their over-all reliance on controlled or uncontrolled oil to a more balanced position among all the refiners. A refiner must, under the Entitlements Program, have one entitlement for each barrel of old oil which it refines during any month. The FEA issues a certain number of entitlements to each refiner each month, based on that refiner's proportionate share of all old oil refined on a nation-wide basis, adjusted somewhat by the small refiner bias.[9] The program thus commenced on the premise that all refiners should be including an equal proportionate share of price-controlled oil in their refinery runs each month.

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proposed rulemaking was issued by the FEA on November 7, 1974, 39 F.R. 39,740 (Nov. 11, 1974), following which the FEA received over 175 comments on the proposed rule. On November 29, 1974, the FEA issued the Entitlements regulation in its final form. 39 F.R. 42,246 (Dec. 4, 1974).

[8] This court has previously stated with regard to a small refiner that: "Pasco, a profitable producer-refiner, operating in the petroleum industry, must accept its fair and equitable share of the burdens as well as the benefits of the programs implementing the Allocation Act which the national energy crisis necessitated." *Pasco, Inc.* v. *FEA*, —— F.2d —— (TECA Slip Opinion No. 10-7, Oct. 14, 1975), 3 CCH Energy Management ¶ 26,031 at p. 26,256.

[9] The small refiner bias provides additional entitlements to small refiners in an amount based on a designated percentage of each small refiner's average daily volume of crude oil runs to stills. 39 F.R. 42,246 (Dec. 4, 1974).

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Entitlement purchase obligations are imposed on a refinery when, on the basis of information supplied to the FEA, it has been determined that the refiner was running more old oil as a percentage of its total crude oil refinery runs than the national average and consequently does not have sufficient entitlements for all of the old oil it has refined during that month. Those refiners with less old oil in their refinery runs than the national average would receive more entitlements than necessary for compliance, which they may sell to those refiners which have purchase obligations under the regulations. Thus,

> [b]y requiring refiners and importers who sell entitlements to reduce their crude oil or product costs by the amount of the entitlement sales proceeds, and allowing a purchaser of entitlements to include the cost of entitlements in its crude oil costs, the FEA basically equalized the average weighted crude oil costs of all refiners, thereby eliminating the inequities caused by the 'two-tier' pricing system.

Pasco, Inc. v. FEA, —— F.2d —— (TECA Slip Opinion No. 10-7, Oct. 14, 1975), 3 CCH Energy Management ¶ 26,031, at p. 26,252, rev'g —— F.Supp. —— (D.Wy.Dkt. No. C75-91, Aug. 27, 1975), 3 CCH Energy Management ¶ 26,025.

Cities Service contends on this appeal that the Entitlements Program is not authorized by the Allocation Act and is not within the FEA's authority to allocate and specify prices for crude oil, residual fuel oil and refined petroleum products. This contention is based upon Cities Service's misinterpretation of Section 4(a) of the Allocation Act and a disregard of the objectives, set forth by Congress in Section 4(b), which the regulations promulgated under Section 4(a) are to achieve "to the maximum extent practicable." Cities Service contends that the objectives of Section 4(b) set forth goals to be accomplished by regulations promulgated under the Allocation Act, but

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that those goals do not delegate any power or authority to the FEA independent of that authority contained in Section 4(a). It asserts that statutory goals such as "protection of public health, safety and welfare . . . and the national defense" are too broad to constitute a grant of any authority independent of Section 4(a).

A proper interpretation of the Allocation Act and its provisions requires recognition of the fact that the authority under Section 4(a) must be read together with the objectives which the exercise of that authority is to obtain. As stated by the Supreme Court in *Richards* v. *United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591 (1962): "We believe it fundamental that a section of a statute should not be read in isolation from the Context of the whole Act. . . ." In *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956), the Supreme Court, in interpreting Section 8(d) of the National Labor Relations Act, as amended, rejected "a narrowly literal construction" of the statute and stated:

> If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute we must not be guided by a single sentence or member of a sentence but look to the provisions of the whole law and to its object and policy." United States v. Boisdore's Heirs (U.S.), 8 How 113, 122, 12 L.Ed. 1009.

350 U.S. at 285, 76 S.Ct. at 359, 100 L.Ed. at 321. *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 288, 77 S.Ct. 330, 1 L.Ed.2d 331, 337 (1957); *Allied Chem. & Alkali Wkrs.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 92 S. Ct. 383, 400, 30 L.Ed2d 341 (1971); *Golden State Bottling Co., Inc.* v. *N.L.R.B.*, 414 U.S. 168, 177, 94 S.Ct. 414, 421, 38 L.Ed.2d 388 (1973).

In a recent decision of the Supreme Court, it has reaffirmed these principles of statutory construction in holding

that the language and meaning of Section 7602 of the Internal Revenue Code of 1954 [which authorizes the Internal Revenue Service (IRS) to issue summons to further its tax investigations] had to be interpreted in a manner consistent with the authority to conduct broad investigatory inquiries conferred on the IRS under Section 7601, in order to avoid frustrating the purpose of those inquiries. *United States* v. *Bisceglia*, 420 U.S. 141, 156 (1975).

In the Joint Explanatory Statement of the Committee of Conference on the Allocation Act, Conference Report 93-628, 2 U.S. Code Cong. & Ad. News, 93 Cong., 1st Sess. 2688, 2689, the Committee stated: "The President is intended to have full flexibility in devising the most effective and efficient means of meeting the priority needs of the American people identified in Section 4(b)." Thus, the allocation and pricing authority of Section 4(a) are without vitality unless and until the FEA exercises such authority in a manner which, to the extent practicable, gives effect to the objectives of Section 4(b).

Neither was the allocation authority considered by Congress as being separate and apart from the pricing authority conferred on the FEA. The Conference Report states: "The conference committee has decided to couple price controls with the mandatory allocation authority so as to focus in a single act decision-making authority and responsibility for dealing with the fuels shortage situation . . . . Congress intends to force the Administration to rationalize and harmonize the objective of equitable allocation of fuels with the objective of the Economic Stabilization Act." Conference Report 93-628, *supra*, 2 U. S. Code Cong. & Ad. News, 93d Cong., 1st Sess. 2688, 2702. Therefore, plaintiff's insistence upon the bifurcation of the authority conferred on the FEA under Section 4(a) from the objectives of 4(b), in their endeavor to assert the lack of specific authority under the Allocation Act for the Entitlements Program, is unwarranted and unreasonable. The Entitlements Program

is clearly within the authority conferred on the FEA under the Allocation Act.[10]

Cities Service further contends on this appeal that the Entitlements Program, 10 CFR § 211.67, as promulgated by the FEA, violates Section 4(b)(2)(A) of the Allocation Act by failing to provide Cities Service with an effective means of passing through its costs resulting from the Entitlements Program on a dollar-for-dollar basis. The Allocation Act, under Section 4(b)(2)(A) mandates that the FEA, in promulgating its regulations, provide a dollar-for-dollar pass-through of net increases in the cost of crude oil. The FEA has responded to this mandate through 10 CFR § 212.83(e)(2). Under this regulation the cost of entitle-

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[10] While it is not necessary to go further in finding authority for the Entitlements program, we note that in *Pasco, Inc.* v. *FEA, supra*, 3 CCH Energy Management at p. 26,258, n. 21, this court stated that: "[t]he Committee Reports of the Senate and House are quite enlightening on the FEA's authority to promulgate the Entitlements program." During its consideration of the first extension of the Allocation Act, a Senate Committee stated that the Allocation Act

> provides ample authority for the F.E.A. to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that F.E.A. intends to institute a price equalization program under existing authority in the immediate future.

S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. at 2 (Aug. 9, 1974).

Further, a House Committee Report, issued two months later, clearly indicates the FEA's authority

> to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The F.E.A.'s stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee

ment purchases and the revenues from entitlement sales must be added to or deducted from the cost of crude oil purchased or landed in that month, for the purposes of calculating the increased cost to be applied to product prices for the following month under the "A+" factor of Section 212.83(e)(2), which is the general product pricing formula.

Cities Service argues that because it has certain banked costs which it was unable to pass through in earlier months prior to the promulgation of the Entitlements Program, it cannot now pass through its entitlements costs due to the current passing through by Cities Service of these former banked costs. The FEA pass-through regulation provides

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that specific amendments to the Act to compel such action may prove to be unnecessary.

H. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3 (Oct. 8, 1974).

Cities Service contends that such legislative reports are "subsequent legislative history" such as are proscribed by the Supreme Court in Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974). The Court there stated, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." However, in this case the Allocation Act was directly before Congress by reason of the expiration of the Act and the necessity of extending its provisions as Congress saw fit. Therefore, the above reports are contemporaneous with the Act's extension and, further, the remarks are not being used to indicate any different legislative intent, but rather that intent expressly found by a contemporaneous construction of the Act by the agency charged with administering it.

Courts give great deference to the construction of an Act by the agency charged with administering it, and hence where Congressional intent congruous therewith is found to have been expressed not subsequent to the Act's passage but contemporaneously with the Act's renewal, its pertinence to the court's task in adjudging the agency's exercise of authority under the Act is clear. *See*, generally, *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Pacific Coast Meat Job. Ass'n, Inc.* v. *Cost of Living Coun.*, 481 F.2d 1388 (T.E.C.A. 1973); *University of Southern California* v. *Cost of Living Coun.*, 472 F.2d 1065 (T.E.C.A. 1972).

for the pass-through of costs other than those derived from the Entitlements Program.[11] However, Cities Service has, during the first four months of 1975, passed through under this regulation costs totaling more than their $23.9 million of entitlement purchases incurred over the same period of time.[12] Whether or not the increased costs which Cities Service passed through were banked costs or entitlement costs, the FEA pass-through regulation is clearly effective for the purpose for which it was promulgated.[13] Whether or not Cities Service passes through its entitlement costs in the month following their purchase, or in a much later month, depends on business judgments which Cities Service must make. The Allocation Act does not guarantee that all increased costs will be absorbed by the market place without any change in the market shares of the respective companies when they pass through such costs under section 4(b)(2)(A); rather, the Act merely mandates that an opportunity for the pass-through of such costs be provided. This the FEA has done, and this court holds that the Entitlements Program does not violate section 4(b)(2)(A) of the Allocation Act.

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[11] Under 10 CFR § 212.83, a refiner's increased product and nonproduct costs may be included to the extent provided in § 212.83, in the computation under § 212.82 of base prices and allowable prices in excess of the base prices for covered products.

[12] See Finding of Fact Number 25, *Cities Service* v. *F.E.A.*, —— F.Supp. —— (D.D.C. CA No. 75-653, July 10, 1975), 3 CCH Energy Management ¶ 26,024 at p. 26,221.

[13] The district court did not, as appellant erroneously contends, premise its finding that Cities Service had failed to show that it could not recover its entitlement purchase costs from the market place on the conclusion that every dollar Cities Service recovered during the first four months of 1975 constituted a recovery of entitlement purchase costs. The district court found that during the first four months of 1975 Cities Service was passing its increased costs through under 10 CFR § 212.83 and thus a mechanism was clearly available by which Cities Service could have passed through its entitlement purchase costs if it had chosen to do so.

Cities Service further contends that the Entitlements Program is arbitrary and capricious and constitutes an abuse of administrative discretion on the part of the FEA, for the reasons that: the entitlements regulation fails to provide for a separation of those companies within the petroleum industry which are integrated companies from those which are not; the Entitlements Program impacted on the market in such a way as to require certain further market distortions by the FEA through its exception process; and the small refiner bias included within the Entitlements regulation, 10 CFR § 211.67(e), is arbitrary and capricious. As stated in *Pasco, Inc.* v. *F.E.A., supra*, 3 CCH Energy Management ¶ 26,031, at p. 26,256.

> [i]n reviewing the discharge of an agency's function in interpreting the Act, promulgating regulations thereunder and applying and enforcing such regulations, this court has recognized that where administrative control has been Congressionally authorized, the "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Pacific Coast Meat Jobbers Association, Inc.* v. *Cost of Living Council*, 481 F.2d 1388, 1391 (TECA 1973), which was quoting from *Mississippi Valley Barge Co.* v. *United States*, 292, U.S. 282, 286-287, 54 S.Ct. 692, 694, 78 L.Ed. 1260 (1934).

This court, in *Pasco*, found that the plaintiffs in that case had failed to establish that the Entitlements Program was arbitrary, capricious, or beyond the agency's authority due to its failure to make a differentiation within the regulation between refiners producing their own crude oil and those refiners purchasing their refining needs. In so holding, we stated:

> The regulation, [10 C.F.R. 211.67] by granting entitlements to those refiners with old oil ratios below the national ratio due to their own high production of

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> new, released and stripper well oil, merely provides for the continuation of the monetary incentive which was a fundamental part of the "two-tier" pricing system. The correction of economic distortion and unfair competitive conditions occasioned by the "two-tier" system was considered essential by Congress and the FEA. . . . This court finds ample support for the entitlements regulation as promulgated by the FEA and, considering the urgent need for action, the implementing agency's program for achieving the varied objectives of the Allocation Act was certainly rational and neither arbitrary, capricious, nor beyond the authority of the agency.

Pasco, Inc. v. *F.E.A., supra,* 3 CCH Energy Management ¶ 26,031, at p. 26,258.

We therefore hold that the Entitlements regulation is a rational response to the changing conditions under which the objectives of section 4(b) must be read, and that the regulation is not arbitrary, capricious or an abuse of administrative discretion.

In accord with the decisions of three district courts which had previously faced the question of the constitutionality of the Entitlements Program, *Exxon Oil Company* v. *F.E.A., supra; Marathon Oil Co.* v. *F.E.A., supra;* and *Gulf Oil Corporation* v. *F.E.A., supra,* the district court in this case found that the contentions of Cities Service as to the unconstitutionality of the program did not present susbtantial constitutional questions requiring certification to this court. Cities Service contends on this appeal that the entitlement purchase obligations imposed on it under 10 CFR § 211.67 are "a *prima facie* case of taking private property and direct bestowal upon another"; that Cities Service is being deprived of its secure access to domestic oil; that the Entitlements regulation constitutes a taking without just compensation; and that it is an unconstitutional tax.

Claims for compensation from the government based upon the Fifth Amendment to the Constitution require a direct appropriation by the government of the claimant's property and do not encompass "consequential injuries resulting from the exercise of lawful power." *Knox* v. *Lee*, 79 U.S. 457, 551 (1870). In reviewing an order of the War Production Board which required the shut-down of non-essential gold mines due to the short supply of equipment and resources, the Supreme Court, in *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), recognized that action under a regulation may so diminish the value of property as to constitute a taking, but stated: "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."[14]

Cities Service and the *amici curiae* ardently contended that *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), "closely parallels" or "controls" this appeal and mandates a finding that the Entitlements program is unconstitutional. For the reasons discussed below we reject this contention.

In *Thompson*, the Supreme Court held invalid a gas proration order issued by the Texas Railroad Commission which limited the production of sweet gas from the plaintiffs' wells to an amount below their production levels, transportation and marketing capacities, and contractual market requirements. This order was issued December 10, 1935, pursuant to House Bill No. 266 (Acts of Texas 1935, c. 120, Vernon's Ann. Civ Stats. Texas, art. 6008), which

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[14] This court had previously held, with regard to the Economic Stabilization Program, that the imposition of price ceilings on beef or the freezing of beef prices was not a "taking of their property without just compensation in violation of the due process clause of the fifth Amendment." *Western States Meat Packers Ass'n Inc.* v. *Dunlop*, 482 F.2d 1401, 1403 (TECA 1974).

was enacted as "a comprehensive conservation statute."[15] *Consolidated Gas Utilities Corp.* v. *Thompson,* 14 F.Supp. 318, n. 3, 319-321 (W.D.Tex. 1936). The Supreme Court stated that the statute,

> construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas . . . , is a valid exercise of the State's undoubted power to legislate to those ends. . . . But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights. . . .

300 U.S. 55, 69. Finding that plaintiffs had amply demonstrated that their operations were free of waste and that continued operations would not be prejudicial to any public

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[15] The Commission order in question indicated that because of the lack of any market demand for natural gas, "intolerable waste" was occurring and "by the fall of 1934, in excess of one billion cubic feet of gas was being blown into the air daily." *Consolidated Gas Utilities Corp.* v. *Thompson,* 14 F.Supp. 318, n. 3, p. 319-321 (W.D. Tex. 1936). The Supreme Court, quoting from special findings of the lower court, found adequate support for plaintiff's assertions that House Bill 266 was a conservation statute intended to prevent waste and that the plaintiffs were not committing any wasteful acts. The Court stated:

> "Before House Bill 266 went into effect, grossly wasteful practices in the production of natural gas in the Panhandle field were occurring," but "most of this waste was due to the extravagant production of natural gas from oil wells and to the production of gas from gas wells and processing such gas for the extraction of a very small quantity of natural gasoline therefrom and popping or wasting to the air the residue gas, which constituted 97% of the fuel value of the gas in its original state. . . . No evidence was offered—indeed, it was not even seriously claimed—that anything complainant had done or contemplated doing has, in the slightest degree, contributed or will contribute to that waste."

Thompson v. *Consolidated Gas Utilities Corp.,* 300 U.S. 55, 70 (1937).

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interest or private property rights, the Court concluded that the "sole purpose" of the orders limiting the plaintiff's production was "to compel complainants to afford markets to those having none," 300 U.S. 55, 77-8, and as such, the orders were invalid.

However, in *Railroad Com.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), the Supreme Court upheld an oil proration order of the Texas Railroad Commission for the East Texas oil field against a Fourteenth Amendment attack that by virtue of allowances made to "marginal wells" (which would have had to be prematurely abandoned had the proration formula restricted their low productive capacity), "[t]he Commission's proration formula as applied permits other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands." 310 U.S. 577, 578. The individual interests of the small well operators and their effect on the state's economy, as well as the general problem of prorating the oil and gas production in the state, were considered by the Court to be within the province of the Commission.[16] The Court particularly noted, at 310 U.S. 577, 583 n. 1, that:

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[16] Referring to the complex "brood of litigation" challenging the administrative determinations which developed out of the states' attempts to adjust leasehold owners' interests with the "rule of capture," the Court, in *Railroad Com.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 580-584 (1940), stated:

> [S]uch cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the

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> *We are here not concerned with a statute, or orders under it, not thought to enforce state policy* "for the prevention of waste, and the protection of correlative rights of owners in the common pool," *but directed solely* "to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product." *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69, 77, 81 L ed 510, 517, 522, 57 S Ct 364. [Emphasis added]

The differences between the circumstances and principles considered and discussed in *Thompson* and the relevant considerations before us now are abundantly clear. Grossly excessive production in the East Texas oil fields twice drove the price of East Texas oil down to ten cents or less per barrel during the early 1930's.[17] In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950),

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> formulation and execution of policy have been entrusted. . . . It is not for the Federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

[17] Hardwicke, *Legal History of Proration of Oil Production in Texas*, 56 Tex. Bar Ass'n Proceedings 99, 111, 120 (Tex. L.R. 1937). By 1932, oil and gas were "universally recognized by courts and Legislatures as natural resources; and legislation looking to their conservation and the prevention of . . . [their waste had] been enacted in practically every state where these resources . . . [were] discovered." *Danciger Oil & Refining Co.* v. *Railroad Commission*, 49 S.W.2d 837, 840 (Tex. C.A.—Austin 1932). It was legislation dealing with these interests of conservation which spawned contumacious production and voluminous litigation for many years. For a background of the Texas experience and the litigation of the oil and gas legislation enacted there, referred to by the Supreme Court in *Railroad Com.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 580 (1939), as an example of the litigation following administrative efforts to solve the adjustment of state and private interests in natural resources, see the Special Order in question and quoted in *Consolidated Gas Utilities Corp.* v. *Thompson*, 14 F.Supp. 318, n. 3, 319-321 (W.D. Tex. 1936).

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the Supreme Court upheld orders of the Oklahoma Corporation Commission which required Cities Service to make a connection with, and take natural gas ratably from, a Peerless Oil & Gas Company well at a price no less than seven cents per thousand cubic feet. Finding the *minimum* price-fixing order lawful as it was substantially related to the alleviation of "existing low field prices [which] were 'resulting in economic waste and conducive to physical waste,' " the Court rejected Cities Services' Due Process and Equal Protection attacks on the Commission orders as being "virtually without substance." 340 U.S. 179, 185-6.

The factual background which preceded enactment of the Allocation Act evidences the increasingly demanding and complex problems facing the country and its governing bodies. The United States unquestionably has become perilously dependent on foreign produced oil, the supply of which is very unstable. By 1973, before the Arab oil embargo, the percentage of crude oil imported for consumption in the United States had reached 35 per cent.[18] The Emergency Petroleum Allocation Act of 1973, as amended, was enacted to meet this and other related energy problems.

While the nation's supply of domestic and imported crude oil is presently adequate, there is a severe shortage of domestically produced crude oil. The availability of imported crude oil is uncertain, and it can be purchased only at drastically higher prices. Greater access to lower cost domestic crude oil by the larger refiners as a class, leaving the small and independent refiners as a class to fend for themselves in purchasing the higher priced imported or domestically produced "new" oil, brought about the necessity for the Entitlements program.

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[18] Project Independence, Executive Summary, 3 CCH Energy Management ¶ 25,005, at p. 25,012 (Fall 1974).

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We repeat that the Entitlements program, like others under the Allocation Act, is a temporary program. *Condor Operating Co.* v. *Sawhill,* 514 F.2d 351 (TECA 1975), cert. denied, 421 U.S. 976 (1975).[19] It composes one segment of an over-all emergency program designed to alleviate the inflationary-recessionary effects on the United States of the Arab oil embargo and the four-fold increase in world oil prices, while the nation prepares itself for energy self-sufficiency and recovery of its economic stability and freedom. The smaller refiners and independent marketers were hit much harder by these world events than were the larger and often integrated oil companies. The fact that Cities Service cannot now capitalize upon these events and refine its own much lower priced oil at will and thereby gain a larger market share or even higher profit margins does not render the program unconstitutional. As stated in *Condor Operating Co.* v. *Sawhill, supra,* at 361:

> The regulation of future action based on rights previously acquired by the person regulated is not per se prohibited by the constitution. *Fleming* v. *Rhodes,* 331 U.S. 100 (1947). Reasonable and practical regulations which are generally fair and equitable, although not necessarily so as applied to a particular person, are not unconstitutional when general regulations are necessary to accomplish an appropriate congressional purpose. *Bowles* v. *Willingham,* 321 U.S. 503 (1944), *Wilson* v. *Brown,* 137 F.2d 348 (Em.Ct. App. 1943).

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[19] The Allocation Act was originally scheduled to expire on February 28, 1975, but on December 5, 1974 it was extended to August 31, 1975. Pub.L. 93-511, 88 Stat. 1608, 1 U.S. Code Cong. & Adm. News, 93rd Cong., 2nd Sess. 1852 (1974). The Allocation Act was extended by Congress again on September 29, 1975 until the 15th of November, Pub. L. 94-99, 89 Stat. 481, 94th Cong., 1st Sess., 121 Cong. Rec. H 9193 (Sept. 26, 1975). On November 14, 1975, President Ford signed Public Law 94-133, which extends the Allocation Act until December 15, 1975. 94th Cong., 1st Sess., 121 Cong. Rec. S. 20046 (Nov. 14, 1975).

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In determining the validity of the stabilization authority granted the President under the Economic Stabilization Act, the three-judge court in *Amalgamated Meat Cutters & Butcher Work.* v. *Connally,* 337 F. Supp. 737, 754 (D.D.C. 1971), noted the relevance of the time frame imposed upon that Act. See *Fry* v. *United States,* —— U.S. ——, 95 S.Ct. 1792, 1796 (1975). This court has recognized time restraints on the Allocation Act. In *Condor Operating Co.* v. *Sawhill, supra,* at p. 362, this court said:

> Essential powers of government to meet this or other crises in perilous times would be frustrated by the adoption of an excessively rigid and unprecedented construction inhospitable to broad realities. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block* v. *Hirsch,* 256 U.S. 135, 157 (1921). . . . Whether the challenged regulation and enforcement order would pass muster as a long continuing response to chronic energy problems need not be decided.[20]

[20] A comparable price equalization pooling program, instituted by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, was upheld by the Supreme Court against contentions that it was contrary to the Fifth and Fourteenth Amendments to the Constitution and an improper delegation of legislative power, in *United States* v. *Rock Royal Co-Operative,* 307 U.S. 533 (1939). The program was implemented to insure an adequate supply of milk while providing a fair division of this most profitable market among producers. All milk producers received a uniform price under the regulation for milk sold to milk handlers even though the value of the milk to the milk handler varied considerably, depending on the particular use made of the milk. However, those handlers putting their milk to a more profitable use were required, under a formula described by appellants herein as being "nearly as complex as the CEP [Entitlements Program]," to pay money through a pooling arrangement to those handlers using their milk in a less profitable fashion. While the regulation as originally applied and upheld by the Supreme Court did not regulate producer-handlers in their capacities as handlers,

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Further, it is well established that a regulatory scheme will not constitute a tax within the meaning of Article I, Section 8, Clause 1 of the Constitution, unless the real purpose and effect of the statute and regulations promulgated thereunder is to raise revenues for the general support of the government. *Head Money Cases (Edye* v. *Robertson),* 112 U.S. 580, 595, 5 S.Ct. 247, 28 L.Ed, 798, 803 (1884); *Moon* v. *Freeman,* 379 F.2d 382, 391 (9th Cir. 1967); *United States* v. *Strangland,* 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers* v. *United States,* 138 F.2d 992, 995 (6th Cir. 1943). As the court stated in *Rodgers* v. *United States, supra,* at p. 994:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Clearly, the Entitlements program does not, even incidentally, raise any revenue for the government or for its support. The entitlements regulation furthers the objectives and purposes of the Allocation Act by regulating refiners' access to crude oil, the price of which has been set below its market value in furtherance of other objectives of the Allocation Act. In addition, the Allocation Act and FEA regulations permit Cities Service to pass through its increased costs under the program and provide measures for the alle-

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i.e., it did not impose any payment obligation on a handler which was handling or processing its "own-produced" milk, such was subsequently required under an amendment to the regulation issued in 1957. The regulation as amended was upheld in *Ideal Farms, Inc.* v. *Benson,* 288 F.2d 608 (3 Cir. 1961), *cert.* denied, 372 U.S. 965 (1963); *Freeman* v. *Vance,* 319 F.2d 841 (5th Cir. 1963).

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viation of extreme hardship through the exemption process, and the regulatory exceptions from its operations.

We hold that the Entitlements Program, promulgated under the authority of the Allocation Act, is valid and constitutional; that the contentions of Cities Service are rejected; that the judgment of the District Court was correct; and it is affirmed. SO ORDERED.

(Caption Omitted in Printing)

Upon consideration of Appellants' Petition for Rehearing, It Is Ordered that said Petition is denied.

For the Court

/s/ Ruth H. Jacobson
Ruth H. Jacobson
Clerk

January 28, 1976

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TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BEFORE HONORABLE EDWARD ALLEN TAMM, CHIEF JUDGE, HONORABLE ROBERT P. ANDERSON, HONORABLE A. SHERMAN CHRISTENSEN, HONORABLE JOE EWING ESTES, HONORABLE FRANK M. JOHNSON, JR., AND HONORABLE JOHN S. HASTINGS, JUDGES

DC-34

CITIES SERVICE COMPANY

and

CITIES SERVICE OIL COMPANY, *Plaintiffs-Appellants,*

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB,
Defendants-Appellees.

Upon consideration of Appellants' Suggestion of Rehearing *En Banc,*

IT IS ORDERED that said Suggestion is denied.

FOR THE COURT

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

January 28, 1976

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TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 10-7

PASCO, INC., *Plaintiff-Appellee,*

v.

FEDERAL ENERGY ADMINISTRATION, an agency of the United States,

and

FRANK G. ZARB, Administrator, Federal Energy Administration, *Defendants-Appellants.*

(FILED OCTOBER 14, 1975)

Marvin Coan, with whom Rex E. Lee, Assistant Attorney General, and Stanley D. Rose, Attorney, Department of Justice, Washington, D.C., were on the brief for the Appellants.

David Ginsburg, with whom Fred W. Drogula and Peter H. Rodgers, Ginsburg, Feldman and Bress, and Ario W. Mayne, Ashland, Kentucky, were on the brief for the Amicus Curiae, Ashland Oil, Inc.

Jerry L. Shulman and Joseph Califano, Jr., Williams, Connally & Califano, Washington, D.C., Jack Speight, Haines, Carmichael, Gage & Speight, Cheyenne, Wyoming, on the brief for the Appellee.

Appeal from the United States District Court for the District of Wyoming
(C75-91)

Before CARTER, CHRISTENSEN, and ESTES, *Judges.*

ESTES, *Judge.*

The plaintiff-appellee, Pasco, Inc., sought and obtained, in the district court, injunctive relief from enforce-

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ment of the defendants-appellants', Federal Energy Administration, et al. (FEA), Old Oil Entitlements Program, 10 C.F.R. § 211.67 (Entitlements program), 39 F.R. 42,246 (December 4, 1974), and a declaratory judgment that the Entitlements program is invalid as applied to Pasco, on the grounds that: the Entitlements program fails to exempt from entitlement purchase obligations all small refiners as defined in section 3(4) of the Emergency Petroleum Allocation Act of 1973, Pub.L. No. 93-159, 87 Stat. 628, 15 U.S.C. § 751 (1975 Supp.) (Allocation Act),[1] and similarly fails to exempt those small refiners established pursuant to federal antitrust decrees,[2] such failures being contrary to Congressional intent in passing the Allocation Act; the Entitlements program is arbitrary and capricious and beyond the FEA's authority, because no differentiation is made, among entitlement sellers, between those refiners running a high proportion of new, released, or stripper well oil which they produced and refiners running a high proportion of such uncontrolled oil which they purchased in the open market; the administrative modification and review of Pasco's exception application was arbitrary, capricious, and contrary to substantial evidence; and the administrative appeal process from FEA exception decisions violated the publication requirements of the Freedom of Information Act, 5 U.S.C. § 552(a)(1).

This expedited appeal is from the August 27, 1975 decision and final judgment of the United States District Court for the District of Wyoming, Cheyenne Division, which granted Pasco complete and permanent relief from its obligations, past and future, under the Entitlements program, and ordered such additional requested relief necessary for the FEA to administratively comply with the court order on an equitable basis *vis a vis* other participants in the program.[3] The district court judgment also dismissed the counterclaim of the United States, which was seeking not only to enforce the Entitlements program

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as applied to Pasco, but also seeking damages for Pasco's past violations of the FEA entitlement regulation.[4]

This court has jurisdiction of FEA's appeal under section 211 of the Economic Stabilization Act of 1970, Pub.L. No. 91-379, 84 Stat. 799, as amended (Stabilization Act), 12 U.S.C. § 1904 note (1975 Supp.), as incorporated into the Allocation Act by section 5(a)(1) thereof, 15 U.S.C. § 754(a)(1) (1975 Supp.).[5]

Pasco's attack on the Entitlements regulation itself, 10 CFR § 211.67, is basically three-fold. It is contended that, contrary to Congressional intent, the FEA failed to specifically and totally exempt from all entitlement purchase obligations, first, all small refiners as defined under the Act and, second, all small refiners established pursuant to an antitrust decree. In addition, Pasco contends and the District Court held that the entire Entitlements program is arbitrary, capricious, and beyond the agency's authority, for the reason that no differentiation is made between producer-refiners and purchaser-refiners; that is, the regulation does not distinguish, in providing for the issuance of entitlements, between those refiners running low proportions of old oil due to their own high production of new, released, and stripper well oil and those refiners running low proportions of old oil due to their purchases of such new, released, and stripper well oil on the open market.

The Allocation Act was enacted by Congress to authorize the President to deal with the present or threatened severe economic hardships caused by shortages of imported and domestically produced crude oil, all of which constituted a "national energy crisis" and a threat to the public health, safety, and welfare. It was the express intent of Congress that the President be granted "full flexibility in devising the most effective and efficient means of meeting the priority of the American people identified in section

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4(b)." H.R. Conf. Rep. No. 93-628, U.S. Code Cong. & Ad. News, 93 Cong., 1st Sess. 2688, 2689 (1973).

In reviewing the exercise of that authority, it must be remembered that the "[e]xercising of the administrative authority and the accomplishment of purposes enumerated by Congress under the recognized emergency conditions are exceedingly complicated undertakings." *Condor Operating Company* v. *Sawhill*, 514 F.2d 351, 359 (TECA 1975), *cert. denied*, —— U.S. ——, 43 USLW 3614 (May 19, 1975). The broad mandate for the equitable allocation of crude oil at equitable prices combined with the rapid rise in world oil prices left the FEA with a "gargantuan task."[6] As stated in *Condor Operating Company* v. *Sawhill, supra*, at p. 359:

> The urgency of the challenge confronting the agency upon the passage of the Emergency Petroleum Allocation Act already has been recognized. *Reeves* v. *Simon*, 507 F.2d 455 (TECA 1974); *People of State of California, State Lands Com'n* v. *Simon*, 504 F.2d 430 (TECA 1974); *Mandel* v. *Simon*, 493 F.2d 1239 (TECA 1974).

To minimize the inflationary impact of world-wide oil prices and at the same time to provide an incentive for increased domestic production of crude oil, the "two-tier" pricing system for crude oil was promulgated.[7] The "two-tier" pricing system basically imposes a ceiling price of approximately $5.25 per barrel on all "old" oil and allows new and released oil to be sold without respect to the ceiling price, i.e., at approximately $11.28 per barrel.[8] The FEA found, however, that while the "two-tier" system met certain necessary objectives, the great disparity between the price of controlled and uncontrolled crude oil was having an unequal impact on all refiners. During the base period of May, 1973, composite crude oil costs of all refiners were approximately equal; however, with the

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pricing system in effect, the major integrated oil companies, who as a class had far greater access to old oil, had significantly lower composite crude oil costs in refining their products than did the small and independent refiners.

To insure that all refiners and marketers shared equally in the benefits of price-controlled crude oil and the burdens of uncontrolled crude oil, the FEA adopted the Entitlements program. Under this program, a refiner must have one "entitlement" for each barrel of old oil it refines during a particular month. All refiners are initially issued for each month an amount of entitlements equal to their proportionate share of the old oil refined during the month on a nation-wide basis. Thus, a refiner running more old oil as a percentage of its total refinery runs than the national average would have to buy additional entitlements from a refiner which ran a smaller percentage of old oil during the month than the national average. The national ratio of old oil runs to total refinery runs is lowered somewhat by the issuance of additional entitlements to small refiners under the "small refiner bias" built into the regulation[9] and to certain eligible firms which import residual fuel oil and home heating oil. By requiring refiners and importers who sell entitlements to reduce their crude oil or product costs by the amount of the entitlement sales proceeds, and allowing a purchaser of entitlements to include the cost of entitlements in its crude oil costs, the FEA basically equalized the average weighted crude oil costs of all refiners, thereby eliminating the inequities caused by the "two-tier" pricing system.[10]

The small refiners, as a class, were by no means overlooked in the promulgation of the Entitlements program. The notice of proposed rulemaking published by the FEA, seeting forth the tentative form of the Entitlements regulation, contained a small refiner bias which was subsequently increased and adopted as a part of the final rule.[11] In addition to the number of entitlements a small refiner

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would otherwise receive for a particular month under the program, the small refiner bias provides additional entitlements to small refiners for each day of that month in an amount equal to a designated percentage of its average daily volume of crude oil runs to stills, with the percentage basis becoming greater as crude oil runs to stills become smaller. Further, an emergency amendment to the entitlements regulation, Special Rule No. 3, was issued by the FEA to provide small refiners with special relief in the form of a graduated phase-in of the program.[12]

The FEA recognized that immediate imposition of the full entitlement purchase requirements of the program could have a severe short-term economic impact on certain small refiners with a high proportion of old oil in their crude oil runs to stills as compared with the national old oil ratio, and that a special rule which would allow these refiners time to arrange any necessary financing or restructuring of their marketing operations was necessary. For the same reasons, the first phase of Special Rule No. 3 was subsequently extended to runs in December, 1974, and, in addition, any refiner filing an exception application on or prior to February 21, 1975 received an automatic extension of the first phase exemption until the application was passed on by the FEA.[13]

Pasco, a small, partially integrated refiner, contends, however, that such provisions failed to effectuate the intent of Congress. Relying on section 4(b)(1)(D) and 4(c)(3) of the Allocation Act as expressions of specific Congressional intent, the district court held the FEA erred in promulgating the Entitlements program without a complete exemption for all small refiners. Section 4(c)(3) requires such adjustments on the part of the Executive in the allocations of crude oil as are necessary to implement the objectives of section 4(b), and section 4(b)(1)(D) established the goal of providing for the

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> preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, nonbranded independent marketers, and branded independent marketers; . . .

While meeting the mandates of section 4(b)(1)(D), however, the FEA at the same time had to consider the other eight objectives of section 4(b)(1), including section 4(b)(1)(F), mandating the "equitable distribution of crude oil, . . . at equitable prices among *all* . . . sectors of the petroleum industry, including . . . small refiners. . . ." [14] The order of the objectives was not intended to establish any priority, nor was it believed that the objectives were mutually attainable.[15] This court has previously recognized that none of the nine objectives of the Act should be elevated to the level of a mandatory duty and that "the balancing of all objectives is required 'to effectuate maximum achievement of their competing interests.'" *Air Transportation Association of America, Trans World Airlines, Inc.* v. *F.E.O., et al.*, —— F.2d —— (TECA slip opinion, Nos. DC-27, 28, 29, July 28, 1975); *Consumers Union* v. *Sawhill*, —— F.2d ——, rehearing en banc (TECA slip opinion No. DC-26, July 7, 1975), vacating 512 F.2d 1112 (TECA 1975).

Under the existing program, small refiners are responsible for approximately 25 per cent of all entitlement purchase obligations. Upon a showing by a refiner in an exception application filed pursuant to 10 CFR § 205, Subpart D, of "serious hardship or gross inequity" (10 CFR § 205.50) under the Entitlements program, the FEA can grant specific relief tailored to the individual refiner through the expedited exception process established with

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the Entitlements program. Indeed, Pasco has received both partial and total relief from it entitlement purchase obligations for the first three quarters of 1975.[16]

The above considerations apply with equal force to the contention of Pasco that small refiners created by antitrust decrees were intended by Congress to be specifically exempt from the entitlements program. Pasco entered the petroleum industry on January 1, 1973, following its purchase of certain properties which were sold pursuant to a 1970 antitrust consent divestiture decree, to effectuate a merger between Sinclair Oil Company and Atlantic Richfield Corporation. *United States* v. *Atlantic Richfield Company*, 297 F.Supp. 1061 (S.D.N.Y. 1969).

The district court, in citing the Congressional Conference Committee Report on the Allocation Act in support of its finding that the FEA erred in failing to exempt Pasco as a refiner established under an antitrust decree, fatally omitted the following underlined language which completed the committee comments on this issue. The Committee Report states:

> The conferees wish to comment specifically on the application of this section in circumstances where a successor company has acquired assets and made capital investments in reliance on a court decree issued in furtherance of a resolution of antitrust claims. As noted in an earlier portion of this report, it is intended that the allocation program minimize economic distortion and interference with market mechanisms. Also legislation lists as a basic objective the need to promote and foster competition in the petroleum industry. It would be an anomalous result if the allocation program would be implemented in a manner which would frustrate or make impossible the accomplishment of a court-ordered decree whose objective was to create a viable competitive entity where

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there was none before. It is expected, therefore, that the President will take care to assure that the allocation program would not interrupt supply agreements, whose very terms had been ordered by a court to assure that an entity would be able to operate in a manner which offers meaningful competition. *The Committee does not wish, however, to totally insulate such supply agreements. It is fully intended and expected that the President would have authority to abrogate such contracts if the President finds that he must do so in order to accomplish the objectives of this Act.*

H.R. Conf. Rep. No. 93-628, U.S. Code Cong. & Ad. News, 93d Cong., 1st Sess. 2688, 2706 (1973).

The FEA in its exception process specifically considered the fact that Pasco was created in an effort to further competition in the petroleum industry.[17] However, the language above was directed at the possible termination of supply contracts to small refiners which were without other sources of oil.[18] The above quoted passage is no indication to this court that a refiner established as a result of an antitrust divestiture decree must be *totally insulated* from the rising cost of the raw materials on which the entire industry depends. Pasco is an entitlements purchaser due to the exceptional benefit it receives under FEA price regulations. It is the competitive advantage available to Pasco by reason of its greater access to old oil, the price of which is controlled under FEA regulations, which Pasco would contend should be continued without the added cost of its entitlement purchases. In the absence of these price regulations, the cost to Pasco of refining that oil which it produced or obtained from others would have risen with the increase in world oil prices just as such costs have risen for those refiners without access to price controlled old oil.

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Pasco has made no showing of any interruption of its supply agreements or inability to utilize effectively their present refinery capacity. On the contrary, Pasco contends that the FEA's regulations should be so structured as to allow it sufficient capital and opportunity to expand its refining capacities without sharing any portion of the enormous burden of the increase in world oil prices since the company's inception.[19] To assume that Congress intended the Allocation Act to provide competitive advantages to certain companies in the form of granting small refiners access to old oil and the major refiners access only to uncontrolled oil or old oil upon the purchase of entitlements is to impose a mandate absent from the Act and the Committee Reports. Pasco, a profitable producer-refiner, operating in the petroleum industry, must accept its fair and equitable share of the burdens as well as the benefits of the programs implementing the Allocation Act which the national energy crisis necessitated.

It was the duty of the FEA to enact regulations consistent with a proper interpretation of the Allocation Act's objectives and, having done so, to determine the question of the application or non-application of such regulations to companies which are within the purview of the Act. In reviewing the discharge of an agency's function in interpreting the Act, promulgating regulations thereunder and applying and enforcing such regulations, this court has recognized that where administrative control has been congressionally authorized, the "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Pacific Coast Meat Job. Ass'n, Inc.* v. *Cost of Living Coun.*, 481 F.2d 1388, 1391 (TECA 1973), which was quoting from *Miss. Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-287, 54 S.Ct. 692, 694, 78 L.Ed. 1260 (1934). See also *Condor Operating Co.* v. *Sawhill, supra; Reeves* v. *Simon*, 507 F.2d 455, 460 (TECA 1974), *cert. denied*, ——

U.S. ——, 95 S.Ct. 1426 (1975); *Mandel* v. *Simon*, 493 F.2d 1239, 1240 (TECA 1974); *University of Southern California* v. *Cost of Living Council*, 472 F.2d 1065, 1068-1069 (TECA 1972), *cert. denied*, 410 U.S. 928 (1973).

To be upheld, the action taken by the FEA need not be the same as the court or the appellee might have taken in correcting the problems occurring as a result of the energy crisis and the impact of earlier regulations, so long as the action taken is reasonable. As the district court noted in *Marathon Oil Co.* v. *FEA* (CA No. 75-36, N.D. Ohio, January 31, 1975), 3 CCH Energy Management ¶ 26,015 at p. 26,152,[20] a "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824 (1971). This court has repeatedly recognized the "well settled principle" of the great deference to be granted the interpretations of statutes and implementing regulations by the agency charged with administering them. In *Pacific Coast Meat Job. Ass'n., Inc.* v. *Cost of Living Coun., supra*, at page 1392, this court, quoting from *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801 (1965), said:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's applications of this statutory term, we need not find that its contruction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 [67 S.Ct. 245, 250, 91 L.Ed. 136]. See also *e.g.*, Gray v. Powell, 314 U.S. 402 [62 S.Ct. 326, 86 L.Ed. 301], Universal Battery Co. v. United States, 281 U.S. 580, 583 [50 S.Ct. 422, 74 L.Ed. 1051]. "Particulary is this respect due when the admini-

> strative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' " Power Reactor Co. v. Electricians, 367 U.S. 396, 408 [81 S.Ct. 1529, 1535, 6 L.Ed.2d 924].

The Supreme Court recently reaffirmed the *Udall* standard of administrative review, in *Fry* v. *United States,* —— U.S. —— (slip opinion No. 73-822, May 27, 1975), 43 USLW 4651, 4652, n. 6, wherein it stated: "We have long recognized that the interpretation of a statute by an implementing agency is entitled to great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16-18 (1965)." Therefore, as stated in *Condor Operating Company* v. *Sawhill, supra,* at p. 359: "The party attacking a regulatory scheme must carry the burden of persuasion." *Bowles* v. *Willingham,* 321 U.S. 503 (1944); *American Nursing Home Ass'n* v. *Cost of Living Council,* 497 F.2d 909 (TECA 1974).

This burden of persuasion has not been met in this instance. The district court's interpretation of Congressional intent ignored the flexibility incorporated in the Act and the many competing objectives which appear on the face of the statute. The Committee Reports make no statement to the effect that either small refiners as a class or small refiners created pursuant to antitrust decrees should be exempt from any portion of the Act or implementing regulations. Had such exemption been intended, Congress could easily have provided such in the Act when its extension was passed, in December, 1974, since the impending implementation of an entitlements program by the FEA was not only known by Congress but was strongly encouraged by Congressional committees.[21] The inclusion of small refiners as a class and small refiners created pursuant to antitrust decress in the entitlements regula-

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tion, with its exception process for hardship cases, is a valid, rational exercise of the agency's authority under the Act and within relevant expressions of Congressional intent.

The holding of the district court that the Entitlements program is arbitrary, capricious, and beyond the FEA's authority due to its failure to make the differentiation contended for by Pasco not only exhibits a failure to consider the latitude confered on the FEA by Congress and the great deference extended by the courts to administrative agencies such as the FEA, but also is entirely inconsistent with the court's order that the FEA perpetuate the program in such a manner as to allow Pasco to recover the amount it expanded for the one month it met its obligations under the program and allow companies which suffered by reason of Pasco's later refusal to comply with its entitlement purchase obligations, to recover such amounts from other entitlement purchasers. The burden of persuasion is, of course, on Pasco in attacking the program, and we find Pasco has failed to establish that the regulation is arbitrary, capricious, or beyond the agency's authority.

The regulation, by granting entitlements to those refiners with old oil ratios below the national ratio due to their own high production of new, released and stripper well oil, merely provides for the continuation of the monetary incentive which was a fundamental part of the "two-tier" pricing system. The correction of economic distortion and unfair competitive conditions occasioned by the "two-tier" system was considered essential by Congress and the FEA. However, in promulgating the entitlements program, the agency still had to consider all of the Act's objectives, including the goal of stimulating increased domestic production and exploration. By refining large proportions of its own uncontrolled oil, thereby lowering its old oil ratio below the national old oil ratio and making

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the producer-refiner eligible to sell entitlements, the producer-refiner has the same production incentive it would receive if it sold its increased production of uncontrolled oil on the free market. This court finds ample support for the entitlements regulation as promulgated by the FEA and, considering the urgent need for action, the implementing agency's program for achieving the varied objectives of the Allocation Act was certainly rational and neither arbitrary, capricious, nor beyond the authority of the agency.

The district court also found that the FEA's modification of the original decision and order in Pasco's application for exception relief and the FEA's denial of Pasco's appeal were not supported by substantial evidence. Following the promulgation of the entitlements provision, Pasco filed an application for an exception and sought a stay of its entitlement purchase obligations, the latter being denied inasmuch as through the operation of Special Rule No. 3 Pasco had not yet purchased entitlements and would not have to do so before the FEA made a final determination of the firm's request for an exception. *Pasco, Inc.*, Case No. FES-1299 (filed 12-16-74, decided 12-20-74), 1 CCH FEA Transfer Binder ¶ 21,668. Pasco's application for an exception was decided on January 20, 1975. *Pasco, Inc.*, Case No. FEE-1299 (filed 12-6-74, decided 1-20-75), 3 CCH Energy Management ¶ 83,021. FEA's decision, based upon the financial information submitted by Pasco relating to the firm's "historical return on equity, return on capital investment, working capital position, profitability, and cash flow" (3 CCH Energy Management at p. 83,058), reduced Pasco's entitlements purchase obligations, computed without regard to any benefit conferred by Special Rule No. 3, by 52% for the first quarter of 1975.[22] It was determined that such relief would permit Pasco to maintain operations at a level similar to that achieved in its 1974 fiscal year and sufficient to continue its projected expansion efforts.

The FEA, while finding that Pasco's total purchase obligations under the Entitlements program would impose a gross inequity on the firm and significantly impair continuation of its long-range capital investment program, also expressly stated, "Pasco has not made a convincing showing that the firm must be entirely relieved of all obligations to purchase entitlements under the provisions of Section 211.67 in order to maintain its present market share and obtain the reasonable level of profits necessary to continue its capital improvement plans." (3 CCH Energy Management at p. 83,057-83,058). A stay of its decision and order pending disposition of Pasco's appeal was denied by the FEA. *Pasco, Inc.*, Case No. FES-0361 (filed 2-20-75, decided 3-3-75), 3 CCH Energy Mangement ¶ 85,012. A supplemental order was issued by the FEA *sua sponte*, on April 2, 1975, modifying its January 20 decision to take into account the increase in the cost of entitlements for crude oil runs in January, 1975, from $5 to $6.[23] (3 CCH Energy Management at p. 83,059).

Pasco admitted in its appeal submitted on February 20, 1975, that assuming only the relief granted in the January 20 decision and order was continued, the firm would still realize net income in 1975 approximately equal to the average of its two previous years' operations. On May 9, 1975, the FEA concluded that its January 20 decision and order was based upon a careful and extensive review of Pasco's entire factual submission in its application for an exception and that the January 20 decision was neither arbitrary nor capricious nor erroneous in fact or law, and the FEA denied Pasco's appeal from the decision and order. *Pasco, Inc.*, Case No. FEA-0361 (filed 2-20-75, decided 5-9-75), 3 CCH Energy Management ¶ 80,587. Pasco contended in its appeal that its after-tax profit for 1975 should be maintained, through an exception to the Entitlements program, at at least the same level as 1974 profits. The FEA found, however, that such a guarantee of profit-

ability was not required by its "hardship" exception process. Pasco applied for exception relief in the second quarter of 1975 and received a 100% exception from all purchase obligations.[24] *Pasco, Inc.*, Case No. FEE-1676 (filed 5-15-75, decided 6-3-75), 3 CHH Energy Management ¶ 83,168.

The review of administrative determinations of exceptions from the complex programs necessary to deal with the petroleum industry and the determination of administrative appeals therefrom requires special attention to the "great deference rule" discussed above. Administrative decisions based upon analysis of the data and information sumbitted on applications for exception relief require the application of administrative expertise, and this court should not be quick to overturn them. In *Consumers Union of U.S., Inc.* v. *Cost of Living Council,* 491 F.2d 1936, 1403 n. 2 (TECA 1974), *cert. denied,* 416 U.S. 984 (1974), this court quoted from *Dandridge* v. *Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 1161 (1970), which stated: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Finding a rational basis for its regulations, no abuse of its administrative procedures or its discretion, and substantial evidence to support its determinations as to Pasco, we find, from a thorough review of the record, that the FEA's original decision and order, its modification, and the denial of an appeal therefrom should be upheld in this case, and that the decision of the district court to the contrary is clearly erroneous.

Finally, the district court further concluded that the defendants failed to comply with provisions of the Freedom of Information Act, 5 U.S.C. ¶ 522(a)(1), in that they failed to identify or describe the decision review committee which reviews all exception appeal decisions. The FEA has, however, published regulations which set forth in a specific and comprehensive manner the procedures govern-

ing the appeal of FEA exception decisions. 10 CFR § 205, Subpart H, 39 F.R. 1924 (January 15, 1974). These regulations indicate that the appeal is to be filed with the Office of Exceptions and Appeals, unless based upon an order issued by a Regional office, which then must be filed with that regional office. In addition, the regulations state the essential contents of the appeal and the FEA evaluation procedure. The regulations do not, in fact, mention an appellate review committee; however, an appellant within the FEA administrative process has no right to appear before this committee,[25] thus knowledge of the committee or its membership could not affect an applicant's preparation of its appeal.[26]

The Freedom of Information Act specifically provides that section 552 does not apply to matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b) (2). This section has previously been interpreted to the effect that it does not require all internal delegations of authority to be published. *Hogg* v. *United States*, 428 F.2d 274, 280 (6 Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 871 (1971). In finding the procedures of an agency to be outside the purview of this section's predecessor, 5 U.S.C. § 1002, the court in *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F.Supp. 777, 786 (S.D.Tex. 1960), affirmed, *per curiam*, 366 U.S. 419, 81 S.Ct. 1356 (1961), found that the unpublished procedure of notation voting by the Interstate Commerce Commission did not "purport to inform parties of the procedure which is to be taken for the presentation of matters to the Commission. It is not designed for the guidance of the public because it in no way affects any steps which interested parties must take or not take in order to obtain, or review, action by the Commission."

This interpretation has been similarly applied to section 552 in *Hogg* v. *United States, supra*, at page 280, wherein it was stated: "Under the provisions of 5 U.S.C. § 552,

the requirement for publication attaches only to matters which if not published would adversely affect a member of the public. See S.Rep. No. 813, 89th Cong., 1st Sess., p. 6, H.Rep. No. 1497, 89th Cong., 2nd Sess., p. 7, 2 U.S. Code Cong. & Ad. News, pp. 2418, 2424." This court recognizes that the Allocation Act, under section 5(a)(1), incorporated section 207, the administrative procedure section of the Stabilization Act, which section excluded administrative Procedure Act, with the express exception of the requirements of, *inter alia*, 5 U.S.C. § 552. However, it cannot be said that such provisions have been violated or that Pasco was in any way affected or prejudiced by the lack of any publication of an identification or description of the Decision Review Committee.

We conclude that the FEA regulations and orders challenged by Pasco are valid and that the decision of the district court to the contrary is clearly erroneous.

The judgment of the district court is reversed and remanded, with instructions to deny plaintiff Pasco relief and to dismiss its action on the merits, and to reinstate the counterclaim of the United States and expeditiously proceed to appropriate disposition thereof, consistently with this decision.

Footnotes

1. The term "small refiner" as used in this opinion shall mean a small refiner as defined under the Allocation Act, i.e., "a refiner whose total refinery capacity . . . does not exceed 175,000 barrels per day." 15 U.S.C. § 752(4) (1975 Supp.).

2. Only two companies, Pasco, Inc. and Navajo Refining Company, exist as small refiners which were created following antitrust divestiture decrees.

3. Upon Findings of Fact and Conclusions of Law filed therewith, the district court issued an injunction which declared all entitlement obligations imposed on Pasco to be invalid and permanently enjoined the FEA from requiring Pasco's compliance with

any past or present entitlement purchase obligations and from imposing any future entitlement purchase obligations on Pasco under the Entitlements program. The district court further ordered the FEA to a) issue to Pasco sufficient entitlements, which Pasco could sell, to enable it to recover the full amount previously expended under the Entitlements program and b) issue sufficient entitlements to other refiners, which they could sell, to enable them to recover monies for further entitlement purchase obligations of Pasco which it refused to meet and which, under the district court order, were declared invalid. On September 5, 1975, the defendants' motion for a stay of the district court order pending appeal was granted by this court.

4. Under Special Rule No. 3, 2 CCH Energy Management ¶ 13,655A, 39 F.R. 43,814 (Dec. 19, 1974), Pasco was totally exempt from the Entitlements program in November, 1974, since its refinery run levels averaged less than 30,000 barrels per day during the month. Therefore, Pasco had no purchase obligations on the January, 1975 entitlements list issued by the FEA. Due to the administrative complexities of computing each refiner's entitlements obligation, there is a two-month lag between the refinery runs and the month in which entitlements must be purchased based on those runs. Thus, for refinery runs made by Pasco during December, 1974, its total entitlements purchase obligation was $465,955, which was paid by Pasco in February under protest. Pasco did not make any further payments under the Entitlements program, even though its obligations for runs during the months of January, February, and March were, respectively: $1,205,328; $1,035,571.50; and $1,810,840.51, for total unpaid obligations of $4,051,740.01 for the months of March, April and May.

5. Throughout the pendency of this appeal, this court has had jurisdiction by reason of section 4(g)(1) of the Allocation Act, 15 U.S.C. § 753(g)(1) (1975 Supp.). Since the Allocation Act, as extended under the terms of the Emergency Petroleum Allocation Act—Extension, Pub.L. No. 93-511, 88 Stat. 1608, expired of its own time limitations at midnight, August 31, 1975, only appeals within the saving clause of the Allocation Act, section 4(g)(1), 15 U.S.C. § 753(g)(1) (1975 Supp.), or the general saving clause, 1 U.S.C. § 109, would have been within our limited jurisdiction on September 5, 1975, when this notice of appeal was timely filed. This appeal comes within the Allocation Act's saving clause, since it provides that "enforcement" actions, civil or criminal, pending on the Act's expiration or based upon acts committed prior to such expiration constitute justiciable controversies which this court may

review. The saving provision of the Allocation Act, section 4(g)(1), 15 U.S.C. § 573(g)(1) (1975 Supp.), is identical to the saving provision, section 218, of the Economic Stabilization Act of 1970, Pub.L. No. 91-379, 84 Stat. 799, as amended (Stabilization Act), 12 U.S.C. § 1904 note (1975 Supp.), which this court carefully considered following the Stabilization Act's expiration. See *United States* v. *State of California*, 504 F.2d 750 (TECA 1974), *cert. denied*, —— U.S. ——, 43 USLW 3645 (June 9, 1975). Accord, *State Trial Attorneys Association, et al.* v. *Houston I. Flournoy, et al.* (TECA slip opinion No. 9-25, Aug. 18, 1975); *Carpenters 46 County Conference Board, et al.* v. *The Construction Industry Stabilization Committee* (TECA slip opinion No. 9-26, July 31, 1975).

6. This phrase was similarly applied to the burden imposed on the Cost of Living Council under the Stabilization Act which, like the Allocation Act, was an extremely broad delegation of authority by Congress to the Executive Branch under recognized emergency conditions. *University of Southern Cal.* v. *Cost of Living Council*, 472 F.2d 1065, 1068 (TECA 1972).

7. The Cost of Living Council originated the "two-tier" pricing system for crude oil as a part of Phase IV of the Stabilization Program. 6 C.F.R. § 150, Subpart L, 38 F.R. 22,536 (Aug. 22, 1973). These rules were subsequently adopted by the Federal Energy Office as 10 CFR § 212, Subpart D, 39 F.R. 1924 (Jan. 15, 1974). The Federal Energy Office became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, Pub.L. 93-275, 88 Stat. 97, 15 U.S.C. § 761 (1975 Supp.).

8. The first sale of crude oil produced from any lease whose average daily production of crude oil for the preceding calendar year does not exceed 10 barrels per well (a stripper well) is also at an uncontrolled price by reason of section 4(e)(2)(A) of the Allocation Act, 15 U.S.C. § 753(3)(2)(A) (1975 Supp.), which specifically exempts such oil from regulation under section 4(a) of the Allocation Act. Basically, under the "two-tier" pricing system, a base production control level for each property was established, based on 1972 monthly production levels. The amount by which the total number of barrels of oil produced and sold from the property exceeds the base production control level for that month and any current cumulative deficiency in the base production control level, constitutes "new" oil (10 CFR § 212.72) which may be sold without respect to the ceiling price of oil (10 CFR § 212.73) under 10

CFR § 212.74. For any month in which the production and sale of oil has been less than the base production control level, since the first month in which new oil was produced and sold, there exists a current cumulative deficiency (10 CFR § 212.72) which may increase by subsequent monthly production below the base production control level or may decrease by subsequent production of what would otherwise be classified as new oil. "Released" oil, which may also be sold without respect to the ceiling price, is that part of the base production control level for any month which is equal to the new oil produced and sold during that month. (10 CFR § 212.72). "Old" oil then represents the total barrels of oil produced and sold from a property during a specific month, less the number of barrels of oil classified as new and released. (10 CFR § 212.72). The old oil must be sold in accordance with the ceiling price rule of 10 CFR § 212.73. For a comprehensive discussion of the validity and effects of the "two-tier" pricing system, see *Consumers Union* v. *Sawhill*, —— F.2d ——, rehearing en banc (TECA slip opinion No. DC-26, July 7, 1975), vacating 512 F.2d 1112 (TECA 1975).

9. 10 CFR § 211.67(e). The phrase "small refiner bias" was used in FEA's published notices of rulemaking. 39 F.R. 39,740 (Nov. 11, 1974); 39 F.R. 42,246 (Dec. 4, 1974).

10. In *Marathon Oil Company* v. *F.E.A., et al.*, —— F.Supp. —— (CA No. 75-36, N.D.Ohio, Jan. 31, 1975), 3 CCH Energy Management § 26,015, the court stated, at p. 26,152:

> The mere fact that three major integrated refiners which have less than their proportionate share of old oil will be entitlement sellers, while a few small refiners will be buyers, does not make the program irrational. Rather, the program merely places the entire petroleum industry in the competitive situation that existed prior to the two-tier pricing system.

To the same effect, see *Cities Service, et al.* v. *F.E.A.*, —— F.Supp. —— (CA No. 75-653, D.D.C., July 10, 1975), 3 CCH Energy Management ¶ 26,024 at p. 26,223; *Gulf Oil Corporation* v. *F.E.A.*, —— F.Supp. —— (C.A. No. 75-157, W.D.Pa., Feb. 4, 1975), 3 CCH Energy Management § 26,014; and *Exxon Oil Company* v. *F.E.A.*, —— F.Supp. —— (C.A. No. 75-150, D.N.J., Jan. 30, 1975).

11. The Entitlements program originated in a notice of proposed rulemaking issued by the FEA on August 28, 1974, which proposed the allocation of old oil being refined in the United States proportionately among all refiners. 39 F.R. 31,650 (Aug. 30, 1974). Following the receipt of more than 600 comments from interested persons, including Pasco, and a public hearing held on September

24 and 25, 1974, the FEA issued another notice of proposed rule making on November 7, 1974, setting forth its tentative conclusions as to the final form the proposed rule should take, and including, in response to comments by small refiners, the small refiner bias. 39 F.R. 39,740 (November 11, 1974). The FEA received over 175 more comments on its November 7 notice and subsequently adopted, on November 29, 1974, the "Old Oil Entitlements Program" with certain changes which included an increase in the amount of the small refiner bias, 39 F.R. 42,246 (Dec. 4, 1974).

12. Special Rule No. 3, in its first phase, essentially provided that for the first 30,000 barrels of crude oil run by a small refiner per day, no purchases of entitlements would be required for runs during the month of November, 1974. For runs during the months of December, 1974, and January, 1975, the rule, in its second and third phases, provided that the small refiner, as to the first 30,000 barrels of crude oil run per day, would have to purchase only one-third and two-thirds, respectively, of the entitlements for which it would otherwise be responsible. 39 F.R. 43,814 (Dec. 19, 1974).

13. 40 F.R. 6197 (Feb. 10, 1975). Thus, for refinery runs in December, the first 30,000 barrels of crude oil run per day by a small refiner were exempt as to entitlement purchase obligations. For the first 30,000 barrels of January, 1975 crude oil runs per day, instead of purchasing two-thirds of its entitlement obligations, as originally provided, a small refiner was obligated for only one-third of its entitlements obligation; and for the first 30,000 barrels of February, 1975 crude oil runs per day, a small refiner was obligated for only two-thirds of its entitlements obligation.

14. In addition to the objectives of subsection (D) and (F) of section 4(b)(1) of the Allocation Act, Congress also indicated that the regulation allocating crude oil under the mandate of section 4(a) should provide "to the maximum extent practicable," for:

> (A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;
>
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);
>
> (C) maintenance of agricultural operations, including farm-

ing, ranching, dairy, and fishing activities, and services directly related thereto;

* * *

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

* * *

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

15. The Conference Committee stated in its report:

The listing of objectives in successive paragraphs (A) through (I) in section 4(b)(1) is not intended to establish any order of priority. There [sic] are collective goals, and the conferees have not attempted to discern an order of precedence or value one against another. It is fully recognized that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another.

Conf. Rep. No. 93-628, U.S. Cong. & Ad. News, 93d Cong., Sess. 2688 (1973). As the district court stated in *Union Oil Company of Calif.* v. *F.E.A.*, —— F.Supp. —— (C.V. 74-1943-MML, Ca., July 25, 1974), 3 CCH Energy Management ¶ 26,007, at p. 98, the "goals [of the Allocation Act] are inherently inconsistent and no regulation could promote all of them at the same time. . . . balancing of goals is required, and Congress has left the details of this balancing to the Federal Energy Administration."

16. Pasco received a 52% exception for the first quarter of , *Pasco, Inc.*, Case No. FEE 1299 (filed 12-6-74, decided 1-20-75), H Energy Management § 83,021; a 100% exception for the second quarter of 1975, *Pasco, Inc.*, Case No. FEE-1676 (filed 5-15-75, decided 6-3-75), 3 CCH Energy Management ¶ 83,168; and an 84.7% exception for the third quarter of 1975, *Pasco, Inc.*, Case No. FEE-1853 (filed 7-31-75, decided 9-17-75), Appendix A to appellants' reply brief filed with this court on October 3, 1975.

17. In Pasco's January 20, 1975 exception decision (3 CCH Energy Management ¶ 83,021), the FEA reviewed its decision on

an earlier exception application filed by the only other small refiner existing pursuant to an antitrust divestiture decree. The FEA stated in Pasco's decision that in *Navajo Refining Co.*, Case No. FEE-1300 (filed 12-16-74, decided 1-2-75), 3 CCH Energy Management ¶ 83,003, which was an aplication for an exception from 10 CFR § 212.83, the agency had

> placed great weight on the fact that the firm had purchased the refinery as a part of a U. S. District Court divestiture decree . . . and that Navajo's acquisition was approved only after the firm stipulated to the Court that it would make every effort to expand the capacity of the refinery [and that] [t]he principles established in *Navajo* and related decisions are clearly relevant to the issues presented by this [Pasco's] case. The Arco divestiture decree and Pasco's concomitant purchase of the Sinclair properties were part of a larger effort by the Department of Justice to reinvigorate and encourage competition in the national petroleum industry and . . . Pasco has developed into the kind of active small competitor the Federal government has sought to foster.

3 CCH Energy Management ¶ 83,021, at p. 83,057. Navajo Refining Co. received exception relief from 10 CFR § 212.83 under its decision and was allowed to calculate the base price of middle distillates it refined by an alternative method. 3 CCH Energy Management ¶ 83,003 at p. 83,006.

Navajo subsequently filed an application for a complete exception from 10 CFR § 211.67, the Entitlements program, which was denied on the basis that Navajo failed to show that its entitlement purchases would significantly impair the firm's financial or operational posture, *Navajo Refining Company*, Case No. FEE-1417 (filed 1-23-75, decided 3-12-75), 3 CCH Energy Management § 83,069. Navajo's application for a stay pending appeal was also denied. *Navajo Refining Company*, Case No. FES-0387 (filed 3-26-75, decided 4-11-75), 3 CCH Energy Management ¶ 85,022. Finding that "circumstances surrounding both the Entitlements Program and Navajo's financial posture have changed substantially since Navajo originally applied for" exception relief, the FEA granted Navajo limited relief from the program for the second quarter of 1975 by reducing the old oil receipts as reported by Navajo, on which its purchase obligations were based, by 5.333 per cent. *Navajo Refining Company*, Case No. FEA-0387 (filed 3-26-75, decided 5-2-75), 3 CCH Energy Management ¶ 80,581, at p. 80,771. This relief was projected to result in a reduction of the firms' average monthly purchases of entitlements, not including any benefit conferred by any special rules, by 32.4877 per cent.

18. The producing and refining capacities of the property Pasco purchased were not sufficient to meet the product requirements of the marketing system which it inherited from Arco. Therefore, Pasco received certain long-term supply contracts from Arco for crude petroleum, motor gasoline, and middle distillates. These types of contracts, to which Congress particularly directed itself in the Conference Report quoted above, were intended, as recognized by the FEA, "to afford Pasco a reasonable opportunity to expand its crude oil production and refining operations to the point where it could through its own productive resources fully satisfy the requirements of the marketing system which it had acquired." 3 CCH Energy Management ¶ 83,021, at p. 83,054. The Entitlements program of course does not abrogate Pasco's supply agreements in any way. What the program does is spread the dramatic increase in world oil prices over all refiners, big and small, which would have occurred in the absence of such regulation but for the fact that the FEA was maintaining a ceiling price on the sale of approximately 40 per cent of the nation's domestic production. It was the greater access to this price-controlled oil on the part of the major companies as a class that prompted the crude oil equalization or entitlements program.

19. Pasco has a substantial capital improvements program aimed at becoming independently able to fulfill its marketing system's needs before its long-term supply agreement with Arco expires in 1977, through expansion and modernization of its refineries and pipelines and the development of secondary recovery programs for its oil fields.

20. The district court in *Marathon Oil Co.* v. *FEA*, 3 CCH Energy Management ¶ 26,015, upheld the Entitlements program against Marathon's contentions that it was arbitrary, capricious and unsupported by substantial evidence. This court dismissed Marathon's appeal for lack of jurisdiction. 516 F.2d 1397 (TECA 1975).

21. The Committee Reports of the Senate and House are quite enlightening on the FEA's authority to promulgate the Entitlements program. At the time of the consideration of the extension of the Allocation Act, the Senate Committee stated that the Act

> provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that FEA intends to institute a price equalization program under existing authority in the immediate future.

> S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. at 2 (Aug. 9, 1974).

Similarly, the House report indicates the same presence of authority for the FEA

> to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary. H. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3 (Oct. 8, 1974).

Pasco has not challenged, and we do not decide, the validity of any entitlement purchases required by the FEA beyond the second quarter of 1975 (i.e., beyond purchase obligations arising in August, 1975 for crude oil runs to stills through June, 1975). Therefore, *only* for the purpose of examining Congressional intent with regard to the Entitlements program, it should be noted that in passing the Emergency Petroleum Allocation Act of 1975, which provided that the Allocation Act be effective through November 15, 1975, Congress clearly expressed its intent that all regulations promulgated under the Emergency Petroleum Allocation Act of 1973 (which necessarily includes the Entitlements program as adopted by the FEA and challenged by Pasco in this case, 10 CFR § 211.67) should be considered in force and effect for the period between August 31, 1975 and the date of enactment of the Emergency Petroleum Allocation Act of 1975. 94th Cong., 1st Sess., 121 Cong. Record H. 9193 (Sept. 26, 1975).

22. The relief was granted in optional form, in that for refinery runs for December, 1974 and the first quarter of 1975, Pasco could reduce its entitlement purchase obligations by 52%, computed under 10 CFR § 211.67 without regard to any Special Rules under § 211.67, or compute its obligations for entitlement purchases under § 211.67 and include any benefits conferred by any Special Rules. 3 CCH Energy Management ¶ 83,021, at p. 83,058.

Special Rule No. 3, the first phase of which was extended through December, 40 F.R. 6197 (Feb. 10, 1975), gave Pasco greater relief for runs during the month of December than it would have received under its January 20, 1975 exception decision. Had the first phase of Special Rule No. 3 not been extended, Pasco would have received

greater benefit from its exception decision than was available under the operation of the second phase of Special Rule No. 3. For all of the runs during the first quarter of 1975, Pasco received greater relief under its exception decision than it received under Special Rule No. 3.

In determining appropriate exception relief in each refiner's case, the FEA uses information, submitted with the refiner's exception application, which is basically intended to show the firm's past, present, and projected operations and its financial ability to meet its entitlement purchase obligations. The FEA calculates the financial impact of the Entitlements program and any necessary relief on an annualized basis, while generally granting relief from obligations under the program only on a quarterly basis. The FEA requires the resubmission of exception applications for each quarter before granting any exception relief for further quarters. Of course, certain of the financial figures and ratios computed therefrom are approximations or projections and in some cases have to be measured over relatively short periods of time. Pasco entered the petroleum industry only two years ago; thus any projection based on historical averages is subject to considerable variation. This is witnessed by the fact that Pasco asserted in its second quarter exception application that its actual results for the first quarter were much worse than Pasco had projected in its own first quarter exception application. 3 CCH Energy Management at p. 83,533. Further, in the FEA decision and order of September 17, 1975, *Pasco, Inc.*, Case No. FEE-1853 (filed 7-31-75, decided 9-17-75), Appendix A to appellants' reply brief, it is noted by the FEA at p. 5, n. 4, that Pasco's

> actual consolidated financial results for the first six months of Pasco's current fiscal year which the firm provided in connection with its current submission indicate that Pasco achieved a level of profitability during that period which substantially exceeded the projections previously submitted by the firm and which formed the basis of the *Pasco II* [Pasco's second quarter exception application] Decision.

Clearly it is a reasonable and rational choice on the part of the FEA to grant exception relief from the Entitlements program on a quarterly basis using certain annualized projections and the refiner's quarterly submissions which include the refiner's actual financial results up to the filing date and the refiner's projections for upcoming quarters.

23. In this supplemental order, the method of calculating the relief granted to Pasco was changed to incorporate the method of

granting relief subsequently adopted by the FEA in issuing other exception decisions following Pasco's January 20, 1975 decision. The new method utilized in the supplemental order provided that Pasco could compute its entitlement purchase obligations for April and May, 1975, without regard to the benefit conferred by any Special Rules, by reducing its reported old oil receipts for runs during February and March, 1975, by 19.08%, or by calculating its obligations under 10 CFR § 211.67, including any benefit contained in any Special Rules. This relief was calculated by the FEA to give Pasco relief from 60% of its entitlement obligations on a monthly basis. 3 CCH Energy Management § 83,021 at p. 83,059-4.

24. The fact that Pasco received a 100% exception for the second quarter of 1975 does not, by itself, as intimated by the district court, indicate that Pasco deserved a 100% exception for the first quarter of 1975. It does indicates that the FEA was not inflexible in its exception decisions and, being sensitive to: the decline in the national old oil ratio and the rise in Pasco's old oil ratio; the increase in the cost of entitlements; the merits of Pasco's exception application for the first quarter; the relief granted therein, including the burden of Pasco's entitlements obligations as yet not purchased for crude oil runs during any month of the first quarter of 1975; and the financial and operational picture of the firm as reflected by its May 15, 1975 exception application, the FEA determined that Pasco was entitled to further and in fact complete relief for the second quarter of 1975.

25. A party appealing an FEA exception decision may, pursuant to 10 CFR § 205.105(d), request that a conference or hearing regarding the appeal be held. Also, the FEA on its own initiative may convene a conference or hearing on the appeal under 10 CFR § 205.106. If, under the guidelines established in 6 CFR § 205, Subpart M, it is determined that a hearing will be held, the FEA then designates one agency official to conduct the hearing pursuant to 10 CFR § 205.172.

26. As this court stated in *Carpenters 46 County Conference Board, et al.* v. *The Construction Industry Stabilization Committee, et al.*, —— F.2d —— (TECA slip opinion No. 9-26, July 31, 1975), at note 5, section 207 of the Stabilization Act, 12 U.S.C. § 1904 note (1975 Supp.), incorporated into the Allocation Act by section 5(a)(1) thereof, 15 U.S.C. § 754(a)(1), "exempts agency action under the Act from most of the provisions of the Administrative Procedure Act, title 5, United States Code, including § 556 on the conduct and right of participants in administrative hearings."

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BLEED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1259

MARATHON OIL COMPANY, *Petitioner*

v.

FEDERAL ENERGY ADMINISTRATION; FRANK G. ZARB, Administrator, Federal Energy Administration; and ASHLAND OIL, INC., *Respondents*

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

BRIEF FOR RESPONDENT ASHLAND OIL, INC. IN OPPOSITION

Respondent Ashland Oil, Inc. ("Ashland") submits this brief in opposition to the petition of Marathon Oil Company for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals.

INTEREST OF RESPONDENT

The Emergency Petroleum Allocation Act of 1973 [1] and the Energy Policy and Conservation Act of 1975 [2] were enacted in part to protect and foster the competi-

[1] 15 U.S.C. §§ 751-56 (the "Allocation Act").

[2] Pub. L. 94-163, 89 Stat. 871 (the "Energy Policy and Conservation Act").

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tive viability of independent petroleum companies by assuring them access to supplies of petroleum at competitive prices. Ashland is an independent refiner of petroleum products as that term is defined in the Allocation Act and benefits from regulatory programs established by respondents, the Federal Energy Administration ("FEA") and Frank G. Zarb to equalize feedstock costs of domestic refiners.[3]

Ashland purchases 82% of its crude oil feedstocks from sources it neither owns nor controls; 60% of its crude oil runs consist of imported crude oil which is priced at approximately $13.40 to $14.25 per barrel. By contrast, a majority of petitioner's crude oil runs and the crude runs of most major oil companies are domestic crude oil subject to a price ceiling of $5.25 per barrel. The entitlements program challenged and upheld below preserves Ashland's economic viability by equalizing the costs of its raw materials with those of the major companies. If Ashland were denied access to the competitive advantages of price-controlled domestic crude oil, it would be unable to compete with petitioner and other major companies.

To protect its interest in the entitlements program, Ashland was permitted by the district court to intervene in the proceedings below pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. Ashland also has intervened or appeared as *amicus curiae* in four similar actions challenging the program.[4]

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[3] 10 C.F.R. §§ 211.62, 211.67 (1975), Petitioner's Appendix, at 46a-57a (the "entitlements program" or "cost equalization program").

[4] Ashland is intervenor in *Exxon Corp.* v. *FEA*, Civil No. 75-150 (D.N.J., filed January 30, 1975), *dismissed for lack of jurisdiction*, 516 F.2d 1397 (TECA 1975) and has appeared as *amicus curiae*

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STATEMENT

The entitlements regulations is one element of an extensive regulatory scheme which today touches virtually every facet of the petroleum industry. Although it initially was conceived as a response to acute petroleum shortages that accompanied the Arab Oil Embargo in October 1973, the program has survived, with modifications, to address continuing economic dislocations. Thus, FEA, exercising its mandatory authority under the Allocation Act has controlled prices and allocations of crude oil and petroleum products for a period of almost two and one half years. These controls extend to nearly every crude and product transaction at every level of production and distribution.

The entitlements program, though providing for cash transfers among refiners, does not constitute an enforced subsidy of any segment of the petroleum industry. Rather, it is a remedial tool designed to ameliorate fundamental problems created by other aspects of the regulatory program. These problems stem from economic and competitive distortions that emerged in 1974 as the result of FEA's adoption of a two-tier price system for crude oil.

Since 1973, FEA has recognized two types of domestic crude oil: "old oil" which is controlled at approximately $5.25 per barrel and "new", "released" and "stripper" oil, prices for which have been allowed to seek market levels—approximately the price of im-

in *Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (TECA 1975); *Cities Service Co.* v. *FEA*, No. DC-34 (TECA, December 31, 1975), *petition for cert. filed* (No. 75-1230, February 27, 1976); and *Gulf Oil Corp.* v. *FEA*, 391 F.Supp. 856 (W.D. Pa. 1975), *dismissed for lack of jurisdiction*, 521 F.2d 810 (TECA 1975).

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ported crude dictated by the Organization of Petroleum Exporting Countries (as indicated above, $13.40 to $14.25 per barrel).[5] The two-tier price system is employed by FEA in a twin-faceted effort to limit the inflationary impact of rising world petroleum prices and to encourage exploration for and production of new domestic petroleum reserves. FEA largely has achieved its policy objectives. The impact of rising world energy prices upon domestic crude prices has been moderated while incentives for increased domestic production are preserved.

By the summer of 1974, it was evident to FEA that the two-tier price structure, despite its salutory effects, had severe and unanticipated economic consequences for the independent sector of the petroleum industry. Because most small and independent refiners traditionally were crude deficient (relying heavily upon foreign imports), their crude acquisition costs had risen dramatically. By contrast, major integrated companies were windfall beneficiaries of the two-tier system, since they owned or controlled the majority of available domestic "old oil" which enjoyed, solely due to governmental action, an immense competitive advantage in the marketplace.[6] Small and inde-

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[5] The Energy Policy and Conservation Act, § 401 requires downward adjustments in prices of all domestic crude oil. Under regulations effective February 1, 1976 (41 Fed. Reg. 4931, 1976) a three-tier price system was adopted. Henceforth "old oil" is controlled at $5.25 per barrel and the remaining domestic crude oil, or "upper tier" crude is controlled at an average of $11.28 per barrel. A third tier consists of imported oil not subject to price controls.

[6] Petitioner cites its past expenditures in exploration and production as a basis for its ownership of "valuable" domestic production, claiming property rights in "old oil". Petitioner's Brief, 4, n.3. Any value associated with access to "old oil", however,

pendent refiners suffered severe losses in earnings and market share and, in some cases, were forced to curtail refinery production. As a result, independent marketers of petroleum products that were customers of independent refiners, suffered similar losses and injury.

FEA responded to the problem with the entitlements program which seeks to distribute the benefits of price-controlled domestic oil equitably among all domestic refiners. This was consistent with FEA's mandate to protect the viability of small and independent refiners[7] and was twice reviewed and approved by Congress.[8]

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results from operation of FEA pricing regulations. Petitioner has chosen not to challenge the two-tier price system itself either on statutory or constitutional grounds. Therefore, its capital expenditures are not relevant to the issues raised by its petition.

[7] The Allocation Act, 15 U.S.C. § 753(b)(1) provides in relevant part:

> ". . . The regulation . . . to the maximum extent practicable, shall provide for . . .
>
> "(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the production, refining, distribution, marketing and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers; . . ."

[8] During consideration of the first extension of the Allocation Act, the entitlements program was reviewed by both Senate and House Commerce Committees. While Congress declined to mandate a cost equalization program, the Committee reports noted that Congress withheld action only upon a commitment from FEA that the entitlements program would be established. S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93rd Cong., 2nd Sess., at 2 (August 9, 1975); H. Rep. No. 93-1443, 93rd Cong., 2nd Sess., at 3 (October 8, 1974). The Energy Policy and Conservation Act, § 403 makes reference to the entitlements program and mandates specific agency action with respect to certain aspects of the cost equalization mechanism.

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ARGUMENT

Petitioner Fails to Raise a Substantial Constitutional Question

Petitioner challenges the constitutionality of the entitlements program on the ground that the program takes property without compensation in contravention of the fifth amendment.[9] In petitioner's view, this is an issue of national significance which raises novel questions not properly decided by the lower courts. Ashland submits to the contrary, that petitioner's constitutional claim is both familiar and without substantial merit.

The entitlements program is responsive to broad Congressional mandates contained in the Allocation Act and is part of a comprehensive regulatory scheme designed to assure adequate supplies of petroleum prod-

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[9] In a companion petition, *Cities Service Co.* v. *FEA*, *supra*, Cities contends that the program is constitutionally defective in that it imposes a tax upon refiners who are buyers of entitlements. In disposing of this argument, TECA properly relied upon the *Head Money Cases (Edye* v. *Robertson)*, 112 U.S. 580 (1884) wherein the Court held that burdens imposed incident to a regulatory program do not constitute a tax. In this regard, the decision rendered in *United States* v. *Butler*, 297 U.S. 1 (1936) has continued vitality and also is relevant. In that case, it was argued that one aspect of a regulatory program was a tax and therefore lawful despite other possible constitutional defects in the program. The Court did not agree:

> ". . . A tax in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effect regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation . . ."

See also Moon v. *Freeman*, 379 F.2d 382 (9th Cir. 1967); *Rodgers* v. *United States*, 138 F.2d 992 (6th Cir. 1943).

ucts, encourage increased domestic production and preserve and foster competition within the industry. It enables the United States to maintain the two-tier price system, and thereby to prevent the OPEC cartel from determining the price of domestic crude oil, without threatening the independent sector of the industry.

A challenge to the program is a challenge to the authority of Congress itself. It is fundamental that the powers of Congress under the commerce clause are as broad as the economic needs of the nation. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). In the context of economic regulation, Congress is fully empowered to deal directly and specifically with forces which in its judgment should not be permitted to prejudice or dislocate any important segment of an industry or the economy as a whole. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940); *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686 (1946). Under these principles, the entitlements program, as part of a broad economic regulatory mechanism, is a classic example of the proper exercise of the commerce power.

Petitioner contends nonetheless that the program will not withstand constitutional scrutiny because it effects a taking of property without just compensation. To succeed in this claim petitioner must establish, first, that it has a vested right in the property at issue, *Mitchell* v. *United States,* 267 U.S. 341 (1925) and, second, assuming such a property right exists, that any diminution in its value results from direct rather than merely consequential governmental action. *Legal Tender Cases* (*Knox* v. *Lee*), 79 U.S. (12 Wall.) 457 (1871). Petitioner fails to meet either requirement.

Petitioner is the beneficiary of pricing regulations which enhance the value of "old oil" which it owns or controls. The entitlements program has limited these advantages by requiring petitioner to share the benefits of price-controlled crude with its crude deficient competitors. Viewed in this light, the FEA has done no more than neutralize with one program the benefits which it conferred by a prior program. *A fortiori*, petitioner has no claim to compensation unless it can establish a vested right in the "property" at issue. However, any value associated with price-controlled domestic oil results exclusively from pricing regulations established by FEA.[10] In these circumstances, petitioner's interests are purely defeasible. *Louisville Bridge Company* v. *United States*, 242 U.S. 409 (1917); *Lichter* v. *United States*, 334 U.S. 742 (1948).[11] As the Court noted fifty years ago in *Louisville Bridge Co.* v. *United States, supra:*

> "... [W]hen private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of [the commerce] power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, ..." 242 U.S. at 417.

Even if petitioner could assert a vested right to its possession of price-controlled oil, it would not be en-

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[10] Petitioner does not contend that it is deprived of property because the controlled price is less than its market value. *See* note 6, *supra*.

[11] *Accord Alton* v. *United States*, 401 F.2d 896 (9th Cir. 1968).

titled to compensation, since at most the effect of the entitlements program upon petitioner is indirect and consequential. *Legal Tender Cases, supra; Cf. Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). The regulation at issue here is an integral part of a program of price controls. While price restrictions of this kind may diminish the value of property, they do not constitute a direct taking. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Block* v. *Hirsch*, 256 U.S. 135 (1921). In the area of economic regulation, the powers of Congress under the commerce clause are extremely broad, particularly in times of fundamental economic change, as is the case with respect to the petroleum industry. *United States* v. *Central Eureka Mining Co.; supra* at 168; *Lichter* v. *United States, supra.*[12] In this regard, it is also important to note that petitioner is permitted to recover its entitlements costs in the market place and has done so. In these circumstances, there is no appropriation or servitude, direct or indirect.

The Entitlements Program Is Fully Authorized by Statute

Citing asserted inconsistencies between TECA's decisions in *Cities Service Co.* v. *FEA, supra* and *Pasco, Inc.* v. *FEA, supra* and a recent decision of the United

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[12] Petitioner's reliance upon *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) is misplaced. In *Thompson*, the Court held that a gas proration order designed to prevent waste could not constitutionally be employed as a subsidy in aid of disadvantaged competitors. However, subsequent decisions clearly limit the holding in *Thompson* to its specific facts. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950). The entitlements program does not award a subsidy. Rather, as described *supra*, it is a remedial mechanism which is an integral part of the regulatory program.

States Court of Appeals for the District of Columbia in *Algonquin, SNG, Inc.* v. *FEA*, 518 F.2d 1051 (D.C. Cir. 1975), *cert. granted*, 96 S. Ct. 265 (1975), petitioner seeks review on the additional ground that the entitlements program is not authorized by statute. This argument also is without merit.

In *Algonquin*, the court of appeals held one aspect of the oil import program unlawful on the ground that it was not authorized by a clear statutory directive. In contrast, the entitlements program stands upon a totally different statutory base, and twice has been considered by Congress and approved.[13] Moreover, as stated by TECA in its *Cities Service* decision, the Allocation Act sets forth broad mandates containing ample authority for the program.

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[13] *See* note 8, *supra*.

CONCLUSION

The decision of the Temporary Emergency Court of Appeals is sound and correct. The petition accordingly should be denied.

Respectfully submitted,

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April 7, 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1230

CITIES SERVICE COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

No. 75-1259

MARATHON OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals in No. 75-1230 (Pet. App. 1a-23a)[1] is

[1] Unless otherwise specifically designated, all citations to "Pet. App." refer to the Appendix in No. 75-1230.

reported at 529 F. 2d 1016. The findings of fact and conclusions of law of the district court (Pet. App. 24a-37a) are not reported.

Neither the *per curiam* opinion of the Temporary Emergency Court of Appeals in No. 75-1259 (Pet. No. 75-1259 App. 1a) nor the opinion of the district court (Pet. No. 75-1259 App. 3a-5a) is reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals in No. 75-1230 was entered on December 31, 1975, and a petition for rehearing with suggestion for rehearing *en banc* was denied on January 28, 1976. The petition for a writ of certiorari was filed on February 27, 1976.

The judgment of the Temporary Emergency Court of Appeals in No. 75-1259 was entered on February 17, 1976. The petition for a writ of certiorari was filed on March 5, 1976.

The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. (Supp. IV) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, and 28 U.S.C. 1254 (1).

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QUESTIONS PRESENTED

1. Whether the Emergency Petroleum Allocation Act of 1973 authorized the Federal Energy Administration to adopt a program equalizing the crude oil costs of domestic refiners.

2. Whether the purchase from another private refiner of entitlements to refine price-controlled oil under the cost equalization program constitutes a taking of private property for a public purpose, without just compensation, in violation of the Fifth Amendment.

3. Whether the purchase of such entitlements constitutes payment of a tax imposed by an administrative agency, in violation of Article I, Section 8, Clause 1 of the Constitution.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. 39a-51a.

STATEMENT

In response to the nationwide petroleum shortages caused in part by inadequate domestic production and the Arab oil embargo, in the fall of 1973 Congress enacted the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act"), 87 Stat. 627, 15 U.S.C. (Supp. IV) 751 *et seq.* The short-

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ages were found to have created or be likely to create "severe economic dislocations and hardships," and Congress directed that the authority granted under the Allocation Act "shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on * * * the domestic economy" (Section 2, 15 U.S.C. (Supp. IV) 751).

Section 4(a) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(a), requires the President to promulgate regulations "providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in * * * and at prices specified in * * * such regulation[s]." Section 4(b)(1) of the Act, 15 U.S.C. (Supp. IV) 753(b)(1), requires that these regulations must provide for the following statutory objectives, to the maximum extent practicable:

> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
>
> * * * * *
>
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small

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refiners, nonbranded independent marketers, branded independent marketers, and among all users;

* * * * *

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

To minimize the inflationary impact of rising world oil prices and to provide the necessary incentive for increased domestic production of petroleum, the so-called "two-tier" pricing system for crude oil was established (Pet. App. 4a-5a).[2] Under this system, "old" oil, that is, oil from properties producing at, or less than, their 1972 levels, cannot be sold at prices in excess of a ceiling level of approximately $5.25 per barrel, which is substantially below the open market price. "New" crude oil, which is the amount of domestic crude oil extracted from a property in excess of its 1972 base production control level, until

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[2] The two-tier pricing system originally was established by the Cost of Living Council as a part of Phase IV of the Economic Stabilization Program. 6 C.F.R. Part 150, Subpart L, 38 Fed. Reg. 22536. Pursuant to Section 5(b) of the Emergency Petroleum Allocation Act, 15 U.S.C. (Supp. IV) 754(b), the President established the Federal Energy Office ("F.E.O.") and delegated to it all his authority under that Act. Executive Order No. 11748, 38 Fed. Reg. 33575. The F.E.O. adopted the two-tier system without substantial change. 10 C.F.R. Part 212, Subpart D, 39 Fed. Reg. 1924. F.E.O. became the Federal Energy Administration ("F.E.A.") pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 97, 15 U.S.C. (Supp. IV) 761 *et seq.*

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recently was permitted to be sold in the open market,[3] where it was subject to foreign competition but still commanded a substantial premium over the price of old oil (Pet. App. 26a-27a).[4] The validity of the two-tier pricing system was upheld in *Consumers Union of the United States, Inc.* v. *Sawhill*, 525 F. 2d 1068 (T.E.C.A.) (*en banc*), vacating 512 F. 2d 1112.

2. Pursuant to its statutory mandate, the Federal Energy Administration ("F.E.A.") promulgated a Mandatory Petroleum Allocation and Price Regulation (the "December 1 Rule"), 10 C.F.R. 211.63(a). It required the maintenance, for the duration of the

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[3] Until its recent modification, the upper tier of this pricing system consisted of three categories of domestic production, "new", "released", and "stripper" oil.

The price at which crude oil may be imported into this country is not regulated by the Allocation Act (Pet. App. 27a).

[4] Title IV of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 941, Sections 401 *et seq.* amended various provisions of the Allocation Act but, with the exception noted at pp. 18-19, *infra*, is not pertinent to this litigation.

Section 401 of that Act, 89 Stat. 941, amended Section 4(a) of the Allocation Act to require that F.E.A. establish ceiling prices applicable to any first sale of domestic crude oil to produce an initial weighted average first sale price not to exceed $7.66 per barrel. Under this formula, the initial average ceiling price for lower tier oil was estimated to be $5.25 per barrel and approximately $11.28 per barrel for upper tier oil. S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 190 (1975); 41 Fed. Reg. 5111.

Section 461 of that Act, 89 Stat. 955, extended the mandatory aspects of F.E.A.'s authority under the Allocation Act for forty months, with standby authority to continue until September 30, 1981.

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regulatory program, of supplier-purchaser relationships in effect on December 1, 1973, under contracts for sales, purchases and exchanges of domestic crude oil. This regulation stabilized the nation's crude oil distribution system and precluded vertically integrated refiners from shifting their own crude oil production to their own refineries and thereby severing the historic access of nonintegrated refiners to domestic crude oil supplies. The constitutionality of this regulation was upheld in *Condor Operating Co.* v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976.

To assure further that "small" and "independent" refiners (as those terms are defined in Section 3(3) and (4), 15 U.S.C. (Supp. IV) 752(3) and (4)) had adequate access to crude oil supplies during the period of shortage, F.E.A. also adopted a Mandatory Crude Oil Sales regulation (the "buy/sell program"). 10 C.F.R. 211.65. It entitles those refiners to purchase petroleum from the 15 largest domestic refiners in sufficient quantity to obtain volumes of crude oil not less than the volumes obtained in 1972. Since oil transferred under the buy/sell program was until recently sold at the vendor's weighted average price for all its crude oil, the purchasers obtained some advantage from the lower, controlled price of old oil to the extent that the sellers had greater access to it.

The December 1 Rule and the buy/sell program guaranteed small and independent refiners access to minimum crude oil supplies. However, these regulations had little effect upon the disparity in the costs

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of raw materials the two-tier pricing system had created between refiners with access to price-controlled old oil and refiners dependent upon market-priced domestic or foreign oil for the bulk of their supply. During the May 1973 base period, the composite crude oil costs of all refiners were approximately equal. But as a result of the implementation of the two-tier system, the major integrated oil companies, which as a class had far greater access to "old" oil, had significantly lower composite crude oil costs than the small and independent refiners (Pet. App. 5a n. 6, 27a-28a). See *Pasco, Inc.* v. *Federal Energy Administration*, 525 F. 2d 1391, 1395 (T.E.C.A.).

The prices charged by refiners for finished products necessarily reflected the differential in raw materials prices.[5] With the availability of adequate supplies upon the lifting of the Arab oil embargo and the renewed significance of price competition, refiners which were disproportionately reliant upon crude oil sold at open market prices were at a competitive disadvantage and were forced to absorb a portion of their increased raw materials costs or suffer a reduction in their market share (Pet. App. 5a, 27a-28a). F.E.A. found that the refiners' unequal access to price-controlled oil had interfered with market mechanisms, weakened the competitive viability of the small and independent sectors of the petroleum in-

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[5] Section 4(b)(2)(A) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(b)(2)(A), required that F.E.A.'s petroleum price regulations provide for a dollar-for-dollar pass-through of net increases in crude oil costs to marketers or retailers.

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dustry, and produced inter-regional price differentials for some refined petroleum products, in contravention of the congressional intention expressed in the Allocation Act (*ibid.*). 39 Fed. Reg. 39740; see *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, 525 F. 2d at 1395.

In order to allocate equitably the benefits of price-controlled old oil (whose scarcity value the two-tier system artificially created) among all segments of the petroleum industry, all regions of the country, and all users of petroleum products, while retaining the inflation dampening and domestic production incentive aspects of the two-tier system, F.E.A. adopted the Cost Equalization Program, 10 C.F.R. 211.67, which petitioners challenge (Pet. App. 6a). Under this program, each refiner must possess one "entitlement" for each barrel of old oil which it refines during any month. F.E.A. initially issues each refiner the number of entitlements equal to its proportionate share of all the old oil refined in the United States during that month.[6]

A refiner which processes more than its proportionate share of the national old oil supply in any month must purchase additional entitlements from a refiner which processed less than its proportionate share of price-controlled oil. F.E.A. establishes the

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[6] The entitlements program favors small refiners, by providing this class with additional entitlements in order to strengthen their economic viability. 10 C.F.R. 211.67(e). Petitioners do not specifically challenge this aspect of the oil entitlements program.

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price of the entitlement on a monthly basis in an amount equal to the approximate difference between the weighted average prices charged for old oil and upper tier or higher-priced crude oil.[7] 10 C.F.R. 211.67(i)(4). Refiners who sell entitlements are required to reduce their raw materials costs by the amount of entitlement sales proceeds for cost pass-through purposes, and purchasers of entitlements are allowed to include the cost of entitlements in their crude oil costs. *Id.* at 211.67(*l*).

The combined effect of the entitlements program and the cost pass-through regulations is to eliminate the inequities created by the two-tier pricing system and substantially to equalize the average weighted crude oil costs of all refiners (Pet. App. 7a).[8] See *Pasco, Inc.* v. *Federal Energy Administration, supra,* 525 F. 2d at 1395.

3. Each month since the inception of the entitlements program, petitioners in No. 75-1230 have processed more than a proportionate share of the national old oil supply and have been required to purchase additional entitlements from other refiners (Pet. No. 75-1230, pp. 9-10; Pet. App. 30a).

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[7] The price of an entitlement was initially $5.00 in January 1975 and was $8.09 in January 1976.

[8] The Cost Equalization Program does not, and was not intended to, equalize fully all crude oil costs. For example, the historic disparities in crude oil costs caused by quality and transportation differentials are not affected by this program. The only disparity in crude oil costs equalized by the program is the price differential artificially created by the two-tier pricing system.

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Petitioners instituted this action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against operation of the Cost Equalization Program. The complaint alleged that the Cost Equalization Program exceeded F.E.A.'s authority under the Allocation Act and was unconstitutional as an administratively imposed tax and a taking of private property for a public purpose, without just compensation.

The district court consolidated the hearing on petitioners' motion for a preliminary injunction with the hearing on the merits and entered judgment for respondents. It held that the Cost Equalization Program was a valid exercise of F.E.A.'s allocation authority under Section 4(a) of the Allocation Act (Pet. App. 32a). Furthermore, it noted that both Houses of Congress had approved F.E.A.'s implementation of a Cost Equalization Program without amendment of Section 4(a) at the time they extended the Act (Pet. App. 33a). It concluded that the conjunction of the entitlements program's allocation of old oil and F.E.A.'s cost pass-through regulations constituted a rational attempt, in conformity with the congressional intention, to eliminate the inequities caused by the two-tier pricing system (Pet. App. 34a). It also held insubstantial petitioners' constitutional challenges (Pet. App. 35a-37a).

The Temporary Emergency Court of Appeals affirmed (Pet. App. 1a-23a). Considering F.E.A.'s authority under Section 4(a) to allocate crude oil and specify its price together with the objectives

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sought to be achieved specified in Section 4(b), the court held the "Entitlements Program * * * clearly within the authority conferred on [F.E.A.] under the Allocation Act" (Pet. App. 9a-10a). The court also found that the entitlements program did not, even incidentally, raise any revenue for the government or its general support and therefore concluded that it did not constitute a tax within the meaning of Article I, Section 8, Clause 1 of the Constitution (Pet. App. 22a). Finally, it held that the Cost Equalization Program was not an appropriation of petitioners' property by the government but was a legitimate exercise of the government's admitted power to regulate the allocation of oil, and that the fact that the effect of the program was to limit petitioners' ability to realize the greatest possible profit on the disposition of that property did not make it a taking of their property in violation of the Fifth Amendment (Pet. App. 15a, 19a-20a).

4. Petitioner in No. 75-1259 instituted this action in the United States District Court for the Northern District of Ohio seeking injunctive relief against operation of the Cost Equalization Program, and specifically from having to purchase $11.6 million in entitlements. The complaint alleged that the entitlements program exceeded F.E.A.'s authority under the Allocation Act and that it violated the Fifth Amendment by effecting a taking of petitioner's property for a private, rather than a public purpose, and without just compensation.

The district court consolidated the hearing on petitioner's motion for a preliminary injunction with the trial on the merits and dismissed the complaint (Pet. No. 75-1259 App. 3a-5a). The court also refused to certify the constitutional question for appeal.[9]

The Temporary Emergency Court of Appeals affirmed, on the ground that its prior decisions in *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, and *Cities Service* were "dispositive as against all of the contentions of [petitioner]" (Pet. No. 75-1259 App. 1a).

ARGUMENT

In essence, petitioners contend that the Cost Equalization Program does not effectuate an "allocation" of crude oil, as that term is used in Section 4(a) of the Allocation Act, but constitutes a direct subsidy of less competitive refiners (Pet. No. 75-1230, pp. 10-12; Pet. No. 75-1259, p. 9). They argue that the program exceeds F.E.A.'s authority under the Allocation Act and is, in any event, unconstitutional. These arguments have been carefully considered and rejected in a series of cases by the Temporary Emer-

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[9] The district court previously had denied similar motions by petitioner for a preliminary injunction against operation of the entitlements program and for certification of the constitutional question (Pet. No. 75-1259 App. 27a-45a). The Temporary Emergency Court of Appeals dismissed petitioner's appeal from that order for lack of jurisdiction. *Marathon Oil Co.* v. *Federal Energy Administration*, 516 F. 2d 1397.

gency Court of Appeals, which has exclusive jurisdiction to consider challenges to the validity and constitutionality of regulations issued under the Allocation Act. Section 5(a)(1), 15 U.S.C. (Supp. IV) 754 (a)(1), which incorporates by reference Sections 211(b)(2) and (c) of the Economic Stabilization Act of 1970, 85 Stat. 749, as amended, 12 U.S.C. (Supp. IV) 1904 note.

In the exercise of its special familiarity with the provisions and legislative history of the Act, that court has concluded that the entitlements program is an allocation mechanism "clearly within" F.E.A.'s statutory authority (Pet. App. 9a-10a) and therefore has rejected the correlative constitutional arguments. There is no conflict of decisions among the courts of appeals on these questions, and the decisions of the Temporary Emergency Court of Appeals do not conflict with any decisions of this Court. Further review is not warranted.

1. Petitioners contend (Pet. No. 75-1230, p. 17; Pet. No. 75-1259, pp. 14-15) that F.E.A. lacked authority under the Allocation Act to promulgate the Cost Equalization Program. They claim that the entitlements program does not allocate crude oil among refiners or regulate its price, as the statute authorizes, but requires refiners to pay cash subsidies to less efficient competitors.

However, payments under the Cost Equalization Program are in no sense a subsidy—no refiner is required to transfer to another person property to which it is otherwise lawfully entitled. Rather, to further other objectives of the Allocation Act, the

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government by regulation fixed the sales price of one component of crude oil production, designated "old" oil, substantially below the open market level. Refiners which fortuitously had access to that petroleum would have received a windfall profit, in the absence of a countervailing government regulation. The price-control regulation granted those refiners no cognizable property right that entitled them to enjoy that price differential. The Cost Equalization Program simply regulates, on an equitable basis, the access of domestic refiners to that crude oil whose price the government has set below its market value (Pet. App. 5a-6a, 22a).

The broad grant of power to the President under the Allocation Act authorized F.E.A. to allocate this government-created benefit through the entitlements program. Section 4(a) requires that the President provide for "the mandatory allocation of crude oil * * * in amounts * * * and at prices specified in" appropriate regulations. The Conference Committee Report on the Allocation Act stated: "The President is intended to have full flexibility in devising the most effective and efficient means of meeting the priority needs of the American people * * *." H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 12 (1973). Thus, Section 4(a) would permit F.E.A. to ameliorate the disparities created by the two-tier pricing system through the physical allocation of old oil and

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new oil among domestic refiners at regulated prices.[10] Congress pointed out that "[i]t is specifically intended that the allocation program operate at the refinery level to compel inter-refinery transfers and exchanges of crude oil." H.R. Conf. Rep. No. 93-628, *supra*, at 22.

Ordering the physical transfer of oil, however, would have disrupted existing market mechanisms, and imposed enormous administrative burdens on both the refiners and the government, while the additional transportation costs would have greatly increased the price of crude oil. 39 Fed. Reg. 31650. Moreover, there is no physical justification for such transfers, since "old" oil and "new" oil are chemically fungible; their sole distinguishing characteristic is the lower price of the former resulting from price controls.

F.E.A. therefore created a paper unit of account, the "entitlement," and required that it be transferred instead of the oil it represents. Each entitlement corresponds to one barrel of old oil. Its sale effectuates the same result as the physical exchange of one barrel of old oil, plus the equalization fee, for a barrel of new oil, but without incurring additional distribution costs. Thus, the entitlements program

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[10] Contrary to the assertion of petitioners in No. 75-1230 (Pet. 19-20), under a system of actual transfer of lower priced oil to some refiners, if they had refined and sold excess quantities of price-controlled oil in any month, they would be obligated to purchase sufficient quantities of uncontrolled oil to rectify the discrepancy.

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cheaply and efficiently produces an allocation of crude oil at regulated prices. The Temporary Emergency Court of Appeals correctly held that F.E.A. had authority under the Allocation Act to adopt it. See *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, 525 F. 2d at 1402.

Moreover, in extending the Allocation Act beyond its original expiration date, both Houses of Congress noted that they had refrained from explicitly requiring that F.E.A. adopt a Cost Equalization Program only because F.E.A. had announced that it intended to promulgate such a system under its existing authority. The Senate Committee Report stated (S. Rep. No. 93-1082, 93d Cong., 2d Sess. 2 (1974)):

> [The Allocation Act] provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that the FEA intends to institute a price equalization program under existing authority in the immediate future.

Similarly the House Report recognized F.E.A.'s authority to institute a cost equalization plan (H.R. Rep. No. 93-1443, 93d Cong., 2d Sess. 3 (1974)):

> Moreover, the Act includes adequate authority to permit the FEA to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the

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> regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary.

See *Id.* at 7 (Statement of John C. Sawhill, Administrator, Federal Energy Administration). As the court below observed (Pet. App. 10a-11a n. 10), these statements of congressional intent, contemporaneous with the first extension of the Act in 1974, confirm that the Allocation Act has, from the date of its enactment, authorized the entitlements program.[11]

Finally, the enactment of Section 403(a) of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 948, shows that Congress recognized that F.E.A. had authority to adopt an entitlements plan. In requiring that any regulation promulgated under Section 4(a) "which requires the purchase of entitlements" contain specific provisions to

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[11] Congress has been fully informed of the operation of the entitlements program, see Hearings on Energy Conservation and Oil Policy before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, Ser. No. 94-17, 94th Cong., 1st Sess. 459 (1975); Hearings on Oversight-Federal Energy Administration Programs before the Senate Committee on Interior and Insular Affairs, Ser. No. 94-16, 94th Cong., 1st Sess. 525 (1975), and extended the Act on three occasions without modification of the relevant language of Section 4(a). Pub. L. 93-511, 88 Stat. 1608; Pub. L. 94-99, 89 Stat. 481; Pub. L. 94-133, 89 Stat. 694.

protect the small entitlements purchaser, Congress explicitly acknowledged the existence of an equalization program as a constituent of the national energy regulation plan.[12] See Section 455 of the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 952.

2. Petitioners contend (Pet. No. 75-1230, p. 15; Pet. No. 75-1259, p. 8) that the mandatory purchase of entitlements constitutes the taking of private property for public use without just compensation, in violation of the Fifth Amendment.[13]

As discussed at pp. 14-15, *supra*, however, these payments constitute the mechanism for equitable dis-

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[12] Petitioner in No. 75-1259 erroneously suggests (Pet. 14-15) that the decision below conflicts with *Algonquin SNG, Inc.* v. *Federal Energy Administration*, 518 F. 2d 1051 (C.A.D.C.), certiorari granted, 423 U.S. 923, argued April 20, 1976 (No. 75-382). The question in that case is whether the President is authorized to adjust imports of oil by imposition of a system of license fees under Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877, as amended, 19 U.S.C. (Supp. IV) 1862(b). The authority of the President to impose such fees under that different statute is irrelevant to any issue in these cases.

Petitioner's reliance (Pet. 15) on *Shell Oil Co.* v. *Federal Energy Administration*, 527 F.2d 1243 (T.E.C.A.), is similarly misplaced. The court there held that F.E.A.'s, authority to regulate the price of petroleum products did not empower it to continue regulation of gas station rentals upon the expiration of wage-price controls.

[13] As the district court noted in *Cities Service* (Pet. App. 36a-37a), all of the district courts that have considered a similar Fifth Amendment challenge to the Cost Equalization Program have considered it insubstantial and have refused to certify it for appeal to the Temporary Emergency Court of Appeals.

tribution of the benefits conferred by government imposition of price controls on old oil; they do not represent a subsidy of the sellers of entitlements. Moreover, the property interest petitioners assert is no more than an unilateral expectation that the government would not withdraw the benefit it previously had extended to those with access to old oil by later amending its petroleum allocation regulations to eliminate their anticipated windfall. This mere expectancy is not a compensable interest under the Fifth Amendment. See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409.[14]

In any event, as the court below properly pointed out (Pet. App. 15a), consequential injuries resulting from the exercise of lawful administrative authority are not compensable under the Fifth Amendment. See *Knox* v. *Lee*, 12 Wall. 457, 551. The constitutionality of petroleum allocation regulations that have the incidental effect of limiting the price at which a refiner may dispose of its crude oil was established in *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976. Here, as part of its overall emergency program to alleviate the inflationary increase in petroleum prices and limit dependency on foreign oil production, the government has instituted allocation and price controls

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[14] Since the entitlements program gives rise to no compensable taking within the meaning of the Fifth Amendment, the argument of petitioner in No. 75-1259 (Pet. 13-14) that the mandatory purchase of entitlements constitutes a taking for a private, rather than a public, purpose is irrelevant.

that have the derivative effect of limiting the profitability of petitioners' sales of old oil.[15] The court below correctly held (Pet. App. 20a):

> The fact that [petitioners in No. 75-1230] cannot now capitalize upon these events and refine its own much lower priced oil at will and thereby gain a larger market share or even higher profit margins does not render the program unconstitutional.

See also, *Block* v. *Hirsch*, 256 U.S. 135.[16]

As the Temporary Emergency Court of Appeals observed (Pet. App. 21a n. 20), this Court has held that a comparable milk price equalization pooling program, instituted under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601, did not deprive persons required to make payments into the equalization fund of their property in violation of the Fifth Amendment. *United States*

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[15] Contrary to the assertion of petitioner in No. 75-1259 (Pet. 11), the fact that Congress recently has extended the effectiveness of petroleum allocation regulations for forty months in no way detracts from the emergency nature of the problems which those regulations address, although they may differ to some extent from the problems in existence at the time the Allocation Act first was enacted. S. Conf. Rep. No. 94-516, *supra*, at 204.

[16] Petitioners also contend (Pet. No. 75-1230, p. 17; Pet. No. 75-1259, p. 13) that the entitlements program constitutes a taking without compensation to the extent that their entitlement purchase costs are not passed through to their customers. However, as the Temporary Emergency Court of Appeals noted (Pet. App. 11a-12a), petitioners' election not to take full advantage of the pass-through regulation in order to have a competitive advantage reflects their business judgment rather than governmental compulsion.

v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 571-573. That program required handlers which sold milk for the most profitable end uses to pay money through a pooling arrangement to handlers which sold milk for less profitable uses. Under the regulation, all milk producers ultimately received a uniform price for all milk sold to handlers. That price equalization regulation, as amended, subsequently has been held applicable to sales of both milk handlers purchase from others and milk they produce themselves. *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608 (C.A. 3), certiorari denied, 372 U.S. 965; see *Freeman* v. *Vance*, 319 F. 2d 841 (C.A. 5). Those decisions strongly support the constitutionality of the instant Cost Equalization Program.

3. Petitioners in No. 75-1230 contend (Pet. 11) that the Cost Equalization payments constitute a tax imposed by an administrative agency, in violation of Article I, Section 8, Clause 1 of the Constitution. Their argument rests on the assumption that entitlement payments are direct subsidies of other refiners for a public purpose, and is fully answered at pp. 14-15, *supra*.

Furthermore, as the court below properly held (Pet. App. 22a), a regulatory requirement does not constitute a tax within the meaning of the Constitution unless its real purpose and effect is to raise revenues for the general support of the government. See the *Head Money Cases*, 112 U.S. 580, 595; *United States* v. *Butler*, 297 U.S. 1, 61; *Moon* v. *Freeman*, 379 F. 2d 382, 391 (C.A. 9); *Rodgers* v. *United*

States, 138 F. 2d 992, 994 (C.A. 6). Since the Cost Equalization Program produces no revenue for the government, payments for entitlements are not a tax (Pet. App. 22a-23a).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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